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No. _____

In The

Supreme Court of the United States

GENE A. RUTHERFORD, JR.,

Petitioner,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court below committed reversible error in affirming a summary judgment dismissing the injured seaman's claims under the Jones Act and the maritime doctrine of unseaworthiness.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

CITATIONS TO OPINIONS ISSUED BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

A. OVERVIEW 2

B. PROCEDURAL HISTORY 4

STATEMENT OF FACTS 6

BASIS FOR FEDERAL JURISDICTION 17

REASONS FOR ALLOWANCE OF THE WRIT 17

A. The District Court Committed Reversible Error in Granting Summary Judgment on Rutherford's Claims for Jones Act Negligence and Unseaworthiness 17

1. In Granting Summary Judgment, The District Court Ignored an Array of Case Law In Which Plaintiffs Have Recovered on Similar Facts 17

2. At Best, Shipowner LMC Has Raised An Issue of Comparative Negligence Which Must Be Determined by a Jury 19

B. The Sixth Circuit Erred in Concluding That Rutherford Failed to Present a Jury Question as to Negligence 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Akzo N.V. v. U.S. Intern'l Trade Com'n, 808 F. 2d 1471 (Fed. Cir. 1986) 11

Ashby v. Hustler Magazine, Inc., 802 F. 2d 856 (6th Cir. 1986) 23

Barrios v. Louisiana Construction Materials Company, 465 F. 2d 1157 (5th Cir. 1972) 23

Bernard v. Maersk Lines, Ltd., 22 F. 3d 903, 1994 AMC 1663 (9th Cir. 1994) 18

Bommarito v. Penrod Drilling Corp., 929 F. 2d 186, 1993 AMC 2107 (5th Cir. 1991) 18

Burden v. Evansville Materials, Inc., 840 F. 2d 343 (6th Cir. 1988) 20

Cobb v. Rowe & Companies, Inc., 919 F. 2d 1089 (5th Cir. 1991) 18

Colby v. J.C. Penney Co., 811 F. 2d 1119 (7th Cir. 1987) 19

Elgin, Joliet & Eastern Railway Co. v. American Commercial Line, Inc., 317 F. Supp. 175 (N.D.Ill.1970) 25

Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957) 24

Gorniak v. National RR Passenger Corp., 889 F. 2d 481 (3d Cir. 1989) 21

Green v. River Terminal Railway Co., 763 F. 2d 805 (6th Cir. 1985) 24

Guevara v. Maritime Overseas Corp., 59 F. 3d 1496 (5th Cir. 1995) 4

TABLE OF AUTHORITIES – Continued

Page

Hall v. American SS Co., 688 F. 2d 1062, 1983 AMC 134 (6th Cir. 1982) 21

Harbin Burlington Northern Railway Co., 921 F. 2d 129 (7th Cir. 1990) 24

Holmes v. J. Ray McDermott & Co., 734 F. 2d 1110, 1985 AMC 2024 (5th Cir. 1984) 18

Johannessen v. Gulf Trading & Transport Co., 633 F. 2d 653 (2d Cir. 1980) 23

Leonard v. Exxon Corp., 581 F. 2d 522 (5th Cir. 1978) 23

Lindemann v. Empress Casino Hammond Corp., No. 97C8938, 1999 WL 59839 (N.D. Ill. Jan. 27, 1999) 19

Mabry v. Travelers Insurance Co., 193 F. 2d 497 (5th Cir. 1952) 3

Matter of Silent Partner, Inc., 119 B.R. 95 (E.D. La. 1990) 11

Moschi v. S/S Edgar F. Luckenbach, 295 F. Supp. 849 (E.D. La. 1969) 21

Noritake Co., Inc. v. M/V Hellenic Champion, 627 F. 2d 724 (5th Cir. 1980) 24

Pedersen v. Diesel Tankers, IRA S. BUSHEY, Inc., 280 F. Supp. 421 (1967) 22

Rapitis v. Sea-Land Corp., 921 F. 2d 281, 1991 WL 105 (1991) 21

Reed Maritrans Operating Partners, 35 F. 3d 556 (4th Cir. 1994) 18

Robak v. Pennsylvania Railroad Co., 81 F. Supp. 841 (E.D. Pa. 1949) 19

TABLE OF AUTHORITIES – Continued

Page

Rodriguez v. Delray Connecting Railroad, 473 F. 2d 819 (6th Cir. 1973) 24

Rogers v. Peabody Coal Co., 342 F. 2d 749 (6th Cir. 1965) 23

Rannals v. Diamond Jo Casino, 265 F. 3d 442 (6th Cir. 2001) 15

Rutherford v. Lake Michigan Contractors, Inc., 28 Fed.Appx. 395 (6th Cir. 2002) 1

Salem v. U.S. Lines Co., 293 F. 2d 121 (2d Cir. 1961) aff'd in part, reversed in part, 370 U.S. 31 (1962) 22

Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939) 20

Southern Railway Co. v. Welch, 247 F. 2d 340 (6th Cir. 1957) 20

Stone v. New York Central & St. L. Railway Co., 344 U.S. 407 (1953) 2, 3

Taylor v. Packard Diving and Salvage Co., 342 F. Supp. 365 (E. D. La. 1971) 22

Thezan v. Maritime Overseas Corp., 708 F. 2d 175, 1985 AMC 1278 (5th Cir. 1983) 21

Thomson v. Texas & Pacific R. Co., 353 U.S. 926 (1957) 20

Toucet v. Maritime Overseas Corp., 991 F. 2d 5, 1993 AMC 2390 (1st Cir. 1993) 18

Waldron v. Moore- McCormack Lines, Inc., 386 U.S. 730, 87 S. Ct. 1410 (1967) 18

Whitted v. Aliquippa & Southern Railway Co., 112 F. Supp. 599 (W.D. Pa. 1953) 19

TABLE OF AUTHORITIES – Continued

Page

Wilson v. Twin Rivers Towing Co., 413 F. Supp. 154 (W.D. Pa. 1976) 18

Yehia v. Rouge Steel Corp., 898 F. 2d 1178 (6th Cir. 1990) 3

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1333 ..... 1, 17

45 U.S.C. § 51 2

Jones Act, 46 U.S.C. § 688 ..... 2, 17

U.S. Const. Art. III, § 2 1

MISCELLANEOUS

Federal Practice & Procedure: Civil 2d § 2729 (1983) 23

CITATIONS TO OPINIONS ISSUED BELOW

The U.S. District Court for the Western District of Michigan granted summary judgment dismissing the injured seaman's case. *Rutherford v. Lake Michigan Contractors, Inc.*, 132 F. Supp. 2d 592 (W.D.Mich. 2000) [App. 14].

The U.S. Court of Appeals for the Sixth Circuit affirmed in an unpublished decision. *Rutherford v. Lake Michigan Contractors, Inc.*, 28 Fed.Appx. 395, 2002 WL 22352, 2002 U.S.App.LEXIS 441 (6th Cir. 2002) [App. 1].

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the Sixth Circuit Court of Appeals dated January 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction. U.S. Const. Art. III, § 2.

The district courts shall have original jurisdiction . . . of: (1) Any civil case of admiralty or maritime jurisdiction[.] 28 U.S.C. § 1333.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy

in cases of personal injury to railway employees shall apply[.] 46 U.S.C. § 688 (the Jones Act).

Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for . . . injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. 45 U.S.C. § 51 (the Federal Employers Liability Act, or FELA).

STATEMENT OF THE CASE[1]

A. OVERVIEW

This is not a case about some arcane subject-matter needing interpretation by an expert. As this Court observed in *Stone v. New York Central & St. L. Ry. Co.*, 344 U.S. 407, 408 (1953), "The likelihood of injury to men

[1] The evidence before the trial court on the motion for summary judgment consists of excerpts from the depositions of Plaintiff Gene Rutherford ("[Pltf. ___, App. ___]"); Rutherford's co-worker at the time of the injury, Mark David Clapsadle ("[Clapsadle ___, App. ___]"); and Wayne Moon, Manager of Lake Michigan Contractors' Ohio Division ("[Moon ___, App. ___]"). There are also certain exhibits, including the Accident Report prepared by Mr. Moon concerning Rutherford's injury [App. 173-174].

pulling or lifting beyond their capacity is obvious."[2] Gene Rutherford, Jr. (Rutherford) does not have a high school diploma. He does not possess sophisticated, high-tech knowledge or skills that will fetch a high price in the job marketplace. Until the devastating injury which gives rise to this lawsuit occurred, his stock-in-trade was his muscles: he was one of the "hewers of wood and drawers of water" (Joshua 9:21, 23) who have existed from time immemorial, bearing and carrying the world's heavy burdens on and with his back – literally.[3]

The human back is a pitifully frail reed when pitted against the mighty stresses generated by the heavy steel cables at issue in this case – cables heavy enough to hold enormous waterborne barges and tugs together. In this case, there was a contest between Rutherford's back and the weight of those heavy cables. Weight which even the Defendant admits in its Accident Report contributed to Rutherford's injury [App. 174]. Indeed Rutherford did

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[2] *Stone* was decided under the Federal Employers Liability Act (FELA). The case law that governs FELA cases also applies to Jones Act cases. *Yehia v. Rouge Steel Corp.*, 898 F. 2d 1178, 1184 (6th Cir. 1990).

[3] Despite his injuries, Rutherford has continued to struggle to work to support his family. As he put it in his deposition, when asked if he was "capable" of continuing to work, "I don't know what you mean by 'capable.' I mean I'm the average American. I have a family. I have to work to make a living, you know." As the Court put it in *Mabry v. Travelers Ins. Co.*, 193 F. 2d 497, 498 (5th Cir. 1952), "Pinched by poverty, beset by adversity, driven by necessity, one may work to keep the wolf away from the door though not physically able to work."

lose the contest. Rutherford's back lost. As a merchant seaman Plaintiff is not eligible for worker's compensation, but rather is limited to recovery of damages under the federal maritime law afforded by the Jones Act, the doctrine of unseaworthiness, and maintenance and cure. If the summary judgment affirmed below is not overturned, Rutherford will be left with nothing more than the "subsistence allowance" of maintenance and cure.[4]

B. PROCEDURAL HISTORY

Rutherford brought suit in the U.S. District Court for the Western District of Michigan on October 29, 1998 [R. 1, Complaint]. Lake Michigan Contractors, Inc. (LMC) brought a motion for summary judgment seeking dismissal of all Rutherford's claims [R. 40, 43, Motion and Supporting Papers]. Rutherford of course opposed the motion [R. 42, 49, Opposition and Supporting Papers App. 93]. Without holding a hearing the Court on February 14, 2000 issued an Opinion and Order on Defendant's Motion for Summary Judgment [R. 56, Opinion and Order, App. 14] ("Opinion").[5] The Court dismissed the claims for Jones Act negligence, unseaworthiness, and maintenance. The Court denied summary judgment on the issue of cure.

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[4] *Guevara v. Maritime Overseas Corp.*, 59 F. 3d 1496, 1500 (5th Cir. 1995).

[5] *Rutherford v. Lake Michigan Contractors, Inc.*, 132 F. Supp. 2d 592, 2000 U.S. Dist. LEXIS 1631 (W. D. Mich. 2000).

Rutherford filed a Motion for Reconsideration with respect to the dismissals [R. 57, Motion for Reconsideration, App. 133]. On May 9, 2000, the Court issued a brief Order denying reconsideration without articulating any additional reasons [R. 62, Order Denying Reconsideration, App. 29].

While the motion for reconsideration was pending, Rutherford asked the Court to defer setting trial on the remaining unresolved issue of cure. Negotiations proceeded between the parties on the cure issue. After the Court denied reconsideration of its decision to dismiss the other claims, the parties reached an agreement to settle the question of maintenance and cure.

The trial court's rulings dismissing Rutherford's Jones Act and unseaworthiness claims were interlocutory and thus non-appealable. In order to bring the case to a close and set the stage for appeal, the parties reached a Stipulation for Final Order of Dismissal [R. 63, Stipulation and Order of Dismissal]. Pursuant to that Stipulation, the District Court entered the Order of Dismissal from which appeal is taken entered on June 20, 2000 [R. 63, Stipulation and Order of Dismissal]. Plaintiff filed a timely Notice of Appeal to the Court of Appeals for the Sixth Circuit [R. 66, Notice of Appeal]. After briefing and argument, the Sixth Circuit affirmed the summary judgment in an unpublished opinion [App. 1].

STATEMENT OF FACTS

About Gene Rutherford. Gene Rutherford is currently 41 years of age and was 38 at the time of accident. He has an 11th grade education. He is married and has two children, ages 20 and 18. Prior to working with LMC he had a number of labor-intensive jobs.

About the Lake Michigan Contractors. LMC is a dredging company with headquarters in Holland, Michigan and Stewart, Florida. It owns a dozen tugboats, a dozen dredges, and a number of barges. It performs dredging operations in the Great Lakes and on both coasts of Florida. LMC owned all the vessels involved on the Genesee River/Rochester, New York dredging project when Rutherford sustained his injury.

Work History with LMC. Mr. Rutherford began working for LMC in May of 1996. He started as a land employee working as a painter, a parts chaser, and a night watchman at the company's Cleveland yard [*Id.*]. For one week in 1996, he worked as a substitute deckhand on the tugboat the *Curly B* [Pltf. 11, App. 64]. He continued as a land employee until late July or early August of 1998 when he was permanently assigned as a deckhand. The Genesee River project was Mr. Rutherford's first job as a full-time deck hand [Pltf. 20, App. 66].

About the Genesee River Project. LMC had two major vessels on the project: the tugboat the *Shirley Joy* to which Mr. Rutherford was assigned as a deckhand and the dredger the *Ojibway*. Also, there were numerous barges [Pltf. 21, App. 66]. Generally, the project involved

the *Ojibway*, which had a crane, dredging the Genesee River and filling the barges. The tug the *Shirley Joy* would then push and/or pull the loaded barge out into Lake Ontario and dump it. It would then return the barge to the dredging area. [Clapsadle 15, 23-25, 38, App. 73-84].

Facing Loaded Barge to the Tug; Rutherford Is Injured. Rutherford was injured while the tug was being "faced" (attached) to a barge filled with debris. When the tug is being "faced" to the barge one of the deckhands (on that day, Rutherford) stands on the front of the tug handing the cable down to the deckhand who is on the barge (on that day, Clapsadle) [Pltf. 59-60, Clapsadle 27-28,[6] App. 78-80]. "Once he hands the line to me, it is my job to hook them up to the corner bits on the barge. Once I'm hooked up on the barge, then the captain runs electric winches and tightens up the lines, pulls the tug and barge right together tight." Clapsadle got onto the full barge; Rutherford stayed on the bow of the tug Shirley Joy, and Rutherford "lifts the hoop of the cable off of the bit on the top up on the tug." From the level of the loaded barge where Clapsadle was standing to the bit off from which Rutherford has to lift the heavy steel cable is a distance of "at least probably eight to ten feet" [*Id.*]. As Rutherford was standing on the bow (that is, the front) of

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[6] "Now, to hook up to the barge, you would have one deck hand on the bow of the tug, which would lower a hemp rope that was hooked right up to your cable, rather than trying to lean all the way over and hand the cable, we had an extra six-foot of line to where you could just hand the cable down hand-over-hand on a hemp rope. That would be handed to the other deck hand which was already down below on the barge."

the tug Shirley Joy: "I was handing the cable to Mark [Clapsadle] on the barge." "We were connecting to the barge. When I grabbed the first cable on port side, and I don't remember if the cable was stuck on a tire or what, but I had to bend over the side to get it to hand it to Mark. . . . That's when I felt a pain in my back." Although he knew something serious had happened in his back, plaintiff went over to the barge and tried to finish his job; "then I just went black. I mean the pain was so severe then I knew something was definitely wrong."[7]

After Rutherford had come down onto the barge Clapsadle walked up to him and noticed immediately that "he had a look on his face like something was really wrong"; told Clapsadle that "he had done something to his back and that he really felt like he couldn't move"; "He said that he twisted or pulled one of the cables and something just went in his back." He was removed from the barge by the Coast Guard and taken to an ambulance ashore.

Crewing the Tug: Theory v. Practice. Rutherford testified that a full crew complement for the tug Shirley Joy required four deckhands. However, at no time while Rutherford was employed on the Genesee River project did the tug ever have the requisite four deckhands [Clapsadle 17-19, Moon 35, App. 74]. Rather, the *Shirley Joy* had a crew of five; two captains and three deckhands. Only

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[7] Rutherford suffered terrible pain at the time of the injury.

one captain and two deckhands were on duty at any one time. One of the deckhands was designated a "flopper" who was on call 24 hours per day and assigned to assist the crewman assigned to unface the tug. The captains rotated six hour shifts as did two of the deckhands.

No Training as a Deckhand. Rutherford had never worked as a deckhand before. He worked approximately three weeks before he was injured on August 20, 1997 [Pltf. 21-22, App. 66]. New employees received no formalized training in deckhand duties from LMC. As Rutherford stated, "I had no prior experience. I don't feel that I was trained properly. I mean, I had to learn as I went. I was – what they would call me as a deckhand. I was green. That is a new guy." This lack of training was specifically acknowledged by LMC in the Employee Accident Form filled out by LMC's own Division Manager. One of the causes of the injury listed on that document is **"unfamiliarity of cable pulling techniques"** [R. 42, Plaintiff's Response to Summary Judgment, App. 93].

Did as He Was Told. The deckhand is the lowest position aboard a vessel. A deckhand's duties consist of doing "whatever you're told to do." Rutherford was new on the job and also on the bottom rung of the vessel hierarchy. "Basically I did what I was told." "All I remember is that I was handed some papers and I went to work and I had done what I was told."

Steel Cables v. Kevlar Synthetic Cables: A World of Difference. On the day Rutherford was injured, LMC provided steel cables for the deckhands to use in facing the tug to the barge. Lowly deckhands did not decide what sort of equipment they were going to use. Rather, they had to do the job with whatever supplies LMC chose to provide.

Heavy Steel Cable Was Cause of Injury, by LMC's Own Admission.

The weight of the steel cable hoop that runs from the tug to the barge was approximately 120-150 pounds [Clapsadle 72, 75, App. 81]. The steel cable was extremely heavy [Pltf. 32 ("there's a lot of weight there"); 41 ("there's so much weight" that deckhand can be pulled overboard); 80 (a "long cable, which is a lot of weight"); 92 (" . . . I mean, the cables were heavy. Evidently I was having trouble [lifting them] or I wouldn't be here right now.")]. It was always necessary to use two hands to lift it [Pltf. 31-32, Clapsadle 72-73, App. 81-82]. Indeed, the steel cables were so exceedingly heavy, and as a result pulled with such decided force, that the deckhand attempting to wrestle with them was often in danger of being pulled overboard into the water.[8]

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[8] "You'd have to hold on with two hands because – if you're on a muddy barge and you have to have one hand on the cable you take a chance of getting pulled into the lake or the river or whatever. I mean there's a lot of weight there." Likewise, "[I]f you don't have your feet planted solid you can get pulled

The Accident Form filled out by LMC Division Manager Moon unequivocally lists one of the causes of the injury as **"Weight of cable"** [R. 42, Plaintiff's Response to Summary Judgment, App. 49].

A Lighter Alternative Was Available. Between May and August of 1997 a much lighter synthetic cable called Kevlar[9] was in use by LMC at the Genesee River project [Pltf. 31-32, Clapsadle 33-34, Moon 23, App. 108]. Clapsadle described Kevlar as "lightweight, almost like nylon; a material that "almost looks like heavy-duty nylon", but is "supposed to be a lot stronger" [Clapsadle 33-34, App. 108].

There was a world of difference between the Kevlar cables and the steel cables. Kevlar was "like rope"; "lightweight"; "A whole lot lighter [than steel cables]. I mean you can lift it with one hand"; a Kevlar line was "hardly any weight at all." "Once we had the lightweight Kevlar,

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overboard. . . . from it because there's so much weight. You have to pull away from the weight to keep from losing the cable. If you slip you either have to let the cable go or it's going to pull you in."

[9] "Kevlar is a polyamide manufactured by E.I. Dupont Co. known for its outstanding strength and stability to high temperatures." Kevlar is light in weight but extremely strong. *Matter of Silent Partner, Inc.*, 119 B.R. 95, 98 n.1 (E.D. La. 1990). *See also Akzo N.V. v. U.S. Intern'l Trade Com'n*, 808 F. 2d 1471, 1477 (Fed. Cir. 1986) (Kevlar is DuPont product with "an extraordinary as-spun strength, five times stronger pound for pound than steel"; "extraordinary physical properties" including "light weight"). Kevlar line was certainly strong enough, then, to use for facing purposes [Clapsadle 36, App. 159].

they were nice, they were easy to handle." During the three weeks Rutherford worked on the *Shirley Joy*, Kevlar lines were in use the majority of the time. Clapsadle testified [Clapsadle 34, App. 108] that the reason LMC changed from steel to Kevlar cables was "More or less to make things easier for the deck hands. It's a lot lighter, a lot easier to handle." Even Manager Moon admitted that in initiating use of synthetic lines the lighter weight was a factor, although one he attempted to downplay.

Rutherford testified that his accident might have been prevented if Kevlar lines had been in use.

What LMC's Own Accident Report Says. In the Lake Michigan Contractors Employee Accident Form filled out and signed by Ohio Division Manager Wayne Moon on the day of the injury [R. 42, Plaintiff's Response to Summary Judgment, App. 49], in response to the printed question "What caused the accident?", the response, in Moon's handwriting, states "***Weight of cable & unfamiliarity of cable pulling techniques.***" In response to the printed question "What action has been or will be taken to prevent recurrence?", Moon wrote, "***Synthetic lines that are stronger yet lighter weight will be reinstalled.***" This is also what Rutherford was advised verbally after the accident.

Why Steel Cable Was Used the Day of Injury. However, it appears that LMC now regrets its manager's candor, and has now adopted a "revisionist" version of history, contending that the discontinuation of the use of Kevlar lines was a deliberate decision based upon "lack

of resistance to breakage." But the testimony proffered by Rutherford, which must be accepted as true for purposes of summary judgment, was that steel cable was in use on the day of the accident because LMC had run out of Kevlar and apparently had neglected to order more [Pltf. 112-113, Clapsadle 35-36, App. 114, 158, 159.

Kevlar Lines Were Used on LMC Vessels Both Before *and After* the Accident Without Trouble. Kevlar lines had been in use before on LMC vessels and there had been no problems. *After* the accident Rutherford went back to work for LMC for a time aboard the *Curley B*. He was more able to do the work on that vessel because *Kevlar lines were in use*. "The *Curly B* has had kevlar lines on it for I don't [know] how long They haven't had any trouble."

All Cables Subject to Breakage. Although LMC tries to suggest that Kevlar was deficient because it could, and sometimes did, break, all three deponents testified that steel cables break, too [Pltf. 35, 113; Clapsadle 57-59; Moon 21, 23-25 (steel cables all break at some point); App. 85]. Even Mr. Moon admitted that the life span of steel cables "varies from one day to four months"; sometimes break *the very first day* [Moon 39, App. 117]. Moreover, steel cable actually presents a greater danger when it breaks ("snapping steel cable would come back and it would cut you in two. It will kill you."). That particular danger would not be present where a Kevlar cable snapped because "Kevlar does not whip back like steel cable."

Kevlar Was More Costly. Kevlar, however, was more expensive than steel cable. Division Manager Moon testified that LMC looked into the use of synthetic line because LMC had a good season and could afford it [Moon 21, App. 85].

Impossible for Rutherford to Bend His Knees. LMC charges Rutherford with failure to use proper lifting techniques in handling the steel cable, i.e., failing to bend his knees. While Rutherford is well aware of this technique [Pltf. 51, App. 68 ("Automatically I know to use my knees. I mean that's common sense.")], in the physical setting where the injury occurred, this was simply impossible. The place on the tug where Rutherford had to stand to perform the cable-handling function – the bow – included "a wall that goes completely around. . . . I don't know two, three-foot high." [Pltf. 51-52, 56, App. 69]. As Plaintiff stated [Pltf. 16, 53 App. 131], "[T]he only place we had to take the cables off, is at the bow of the boat . . . It would be hung on the bow on the boat that would hang over the side; you couldn't bend at the knees because you would bump your knee on the side of the boat . . . you'd have to bend over . . . You cannot bend at the knee and pick up the cable." See also Pltf. 59, App. 124 (because of wall "there's no way you can bend.")[10]

The place in the tug where Rutherford had to stand to perform the cable handling function, the bow, included a wall that goes completely around at three foot high. The wall made it impossible to bend at the knee given the

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[10] By contrast, while handling cables *on the barge*, there is no such "wall" and deckhands can and do bend at the knees.

location of the cable which was stored in such a fashion that Rutherford was required to reach over to untangle it. In *Rannals v. Diamond Jo Casino*, 265 F. 3d 442 (6th Cir. 2001), the Sixth Circuit reiterated the standard for surviving Summary Judgment in a Jones Act case

> "Plaintiff had to show a genuine issue of material fact regarding whether (1.) She was seaman, (2.) She was acting in the course of her employment at the time she was injured, (3.) Defendant and/or its agents played *any* (emphasis added) part in causing the injury."

In *Rannals*, Defendant contracted with a training center where seaman were trained out of state. Plaintiff was injured when she slipped on ice at the facility. Liability was found based on constructive notice to the training center. Clearly, Rutherford has presented more than sufficient evidence establishing general issues of material facts which were wrongfully taken from the jury.

Complaints About Back Problems from Handling Heavy Steel Cables. LMC knew or had reason to know of back problems as the result of stresses imposed by the heavy steel cables. Crewmen on the *Shirley Joy* complained about soreness to the back from lifting cables [Pltf. 60, 61, 74, App. 71]. Indeed, Moon admitted that Kevlar's lighter weight was a reason for purchasing it, although he attempted to downplay that reason. The back problems complained of were a direct result of the heaviness of the steel cables: "The cables are heavy. There's no doubt about it. I mean you take steel, compare it to kevlar, a 100 percent difference." Rutherford and everyone else complained about using the steel cables.

So-Called "Help" Was Asleep in His Bunk. The trial court accepted LMC's contention that plaintiff should have sought assistance from another crew member, Steve Byrum. But the evidence is clear that Byrum was not on the deck of the tug where he could have been called over: "He was in bed." [Clapsadle 32, App. 110] Even if plaintiff theoretically could have called Byrum out of his bed and up to the deck [Clapsadle 21, App. 77], there is, at a minimum, a genuine fact question as to whether a reasonable person in Rutherford's position and experience should have known he needed extra help until split seconds before the injury – clearly too late to call the theoretical "help" up from the Land of Nod.

Weight Belts Were Unavailable, Not in Use or Not Required. While there was testimony that a weight belt might have prevented accident, Rutherford did not recall there being any such belts aboard the vessel. [Pltf. 94-95, App. 127] Clapsadle heard vaguely that there might be some kind of belt "there somewhere. But myself, I never used one . . . " [Clapsadle 55, App. 126, 129]. Clapsadle was unequivocal that LMC had no rule or instruction requiring the use of such a belt, if indeed there was even one aboard. Manager Moon made one self-serving statement in his deposition claiming that LMC supplies weight belts for use by deck hands, at which time his counsel instructed him to answer no further questions on the subject [Moon 34, App. 165].

BASIS FOR FEDERAL JURISDICTION

The District Court had jurisdiction over the cause pursuant to the Jones Act, 46 U.S.C. § 688, and pursuant to 28 U.S.C. § 1333(1).

REASONS FOR ALLOWANCE OF THE WRIT

A. The District Court Committed Reversible Error in Granting Summary Judgment on Rutherford's Claims for Jones Act Negligence and Unseaworthiness.

The key to the trial court's summary judgment was its implicit conclusion that Rutherford's failure to ask for more help barred his recovery as a matter of law. The Opinion states: "That Rutherford did not seek help suggests that he did not believe he needed it, or that even if he did, he did not notify anyone that he did. Under the circumstances, the court concludes that he has failed to establish breach of a duty by LMC which would render it liable to Rutherford in negligence." [R. 56, Opinion and Order, App. 14].

1. In Granting Summary Judgment, The District Court Ignored an Array of Case Law In Which Plaintiffs Have Recovered on Similar Facts.

Cases are legion where Plaintiff seamen have recovered for back injuries as a result of negligence of the

Defendant shipowner and unseaworthiness of their vessels when failing to provide them with adequate assistance in lifting circumstances. On all fours with the facts of this case is the seminal case of *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 730, 87 S. Ct. 1410, 1412 (1967) where the Supreme Court held that unseaworthiness of a vessel resulted when the Third Mate assigned two men instead of three or four to uncoil a heavy rope, and carry it 56 feet to the edge of the ship. The Court stated "by assigning too few men to uncoil and carry the heavy rope the Mate caused both the men and the rope to be misused." See also *Cobb v. Rowe & Companies, Inc.*, 919 F. 2d 1089 (5th Cir. 1991) (affirming $543,000 verdict for back injuries to seaman while lifting 35 lbs. of luggage; medical evidence supported causation); *Wilson v. Twin Rivers Towing Co.*, 413 F. Supp. 154 (W.D. Pa. 1976) (Plaintiff entitled to recover for back injury sustained by lifting a "too heavy" box of meat, which rendered vessel unseaworthy); *Toucet v. Maritime Overseas Corp.*, 991 F. 2d 5, 7-8, 1993 AMC 2390 (1st Cir. 1993) (seaman jolted by grasping slipping hose, "felt his back crack" no help provided to Plaintiff but for an inept crewman as remaining crew was sleeping); *Holmes v. J. Ray McDermott & Co.*, 734 F. 2d 1110, 1985 AMC 2024 (5th Cir. 1984) (back injury while lifting steel cable; $412,000 verdict affirmed); *Reed Maritrans Operating Partners*, 35 F. 3d 556 (table), 1994 WL 463412, 1994 U.S. App. LEXIS 23656 (4th Cir. 1994) (affirming $244,000 verdict for mariner; back injury caused by "surging" of mooring line); *Bommarito v. Penrod Drilling Corp.*, 929 F. 2d 186, 1993 AMC 2107 (5th Cir. 1991) (affirming $355,000 verdict for mariner's back injury; directed verdict properly denied). *Cf. Bernard v.*

Maersk Lines, Ltd., 22 F. 3d 903, 1994 AMC 1663 (9th Cir. 1994) (summary judgment reversed where ship's cook claimed back injury from lifting excessive amount of meat).[11] Given the array of "on-point" decisions it was error for the trial court to rely dispositvely on *Lindemann v. Empress Casino Hammond Corp.*, No. 97C8938, 1999 WL 59839, at *4 (N.D. Ill. Jan. 27, 1999).[12]

This unpublished Westlaw decision dealt with numerous cocktail servers who were assigned the job of carrying loads of glasses and had the option of lightening their load. Mr. Rutherford had no option but to lift a 120-150 lb. cable. The only way he could lighten his load was if Defendant used lighter line – an alternative which was clearly available to them.

2. At Best, Shipowner LMC Has Raised An Issue of Comparative Negligence Which Must Be Determined by a Jury.

It has been the law for many decades in FELA/Jones Act cases that a finding of "contributory negligence, however, gross, is not a bar to recovery but mitigates

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[11] See also FELA cases *Robak v. Pennsylvania Railroad Co.*, 81 F. Supp. 841 (E.D. Pa. 1949) (back injury from assignment of too-heavy work); *Whitted v. Aliquippa & Southern Ry. Co.*, 112 F. Supp. 599 (W.D. Pa. 1953) (injury in carrying a "switch tie"; claim that six rather than four men should have been assigned).

[12] As noted in *Colby v. J.C. Penney Co.*, 811 F. 2d 1119, 1123 (7th Cir. 1987), district courts "must not treat decisions *by other district judges*, in this and *a fortiori* in other circuits, as controlling" (emphasis in the original). The Court emphasized that "Federal district judges in Detroit do not make law that is binding on federal district judges in Chicago." *Id.* at 1124.

damages." *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 431 (1939). See also *Thomson v. Texas & Pacific R. Co.,* 353 U.S. 926 (1957).

Other cases agree. The facts of *Southern Railway Co. v. Welch,* 247 F. 2d 340 (6th Cir. 1957), are remarkably similar to those in the case at bar, and *Welch* was decided under the same body of FELA-Jones Act law. Welch was a railroad worker who sustained serious injury to his back while pulling on a heavy weight (metal rails). As in the case at bar, the employer contended that the operation "was always a one-man job" [247 F. 2d at 341]. The railroad further argued that Welch's recovery should be barred by his failure to request additional help. The Court rejected that argument, noting that the argument was based upon the principles of assumption of risk and contributory negligence [*Id.*]. Assumption of risk, of course, had been abolished in FELA (and by extension, Jones Act) cases in 1939. It was further noted that the decisions "do not lay down a hard and fast rule with reference to the necessity of protest or request for additional necessary assistance" [247 F. 2d at 342]. What we would call today comparative negligence, said the Court in *Welch,* might serve to reduce plaintiff's recovery but would not totally bar it.

In *Burden v. Evansville Materials, Inc.,* 840 F. 2d 343 (6th Cir. 1988), the Court affirmed an award of damages to a seaman who injured his back while moving towing cables from a tug to a barge. This affirmance included the trial court's assessment of comparative negligence against Mr. Burden after assessing a number of factors including the evidence that Burden had failed to observe

proper lifting techniques which he had been taught (as opposed to Rutherford, who had no such training).

Cases from other courts are to similar effect. *See*, e.g., *Gorniak v. Nat'l RR Passenger Corp.*, 889 F. 2d 481, 482 (3d Cir. 1989) (jury award for back injury in FELA case reduced 10% for comparative negligence); *Moschi v. S/S Edgar F. Luckenbach*, 295 F. Supp. 849 (E.D. La. 1969), *aff'd*, 424 F. 2d 1060 (5th Cir. 1970) (finding ship failed to carry full crew complement but seaman was contributorily negligent); *Thezan v. Maritime Overseas Corp.*, 708 F. 2d 175, 1985 AMC 1278 (5th Cir. 1983) (jury award in Jones Act lifting case reduced for comparative negligence).

In *Rapitis v. Sea-Land Corp.*, 921 F. 2d 281 (table), 1991 WL 105, 1991 U.S. App. LEXIS 85 (9th Cir. 1991), the plaintiff mariner injured his back while lifting an item weighing only 40 lbs.-80 lbs. The lower Court dismissed the case for the same reason that this Court has dismissed Mr. Rutherford's case, finding that the Plaintiff had not asked for additional help. In reversing the erroneous summary judgment, the Ninth Circuit in *Rapitis* quoted from authority holding "despite a seaman's failure to ask for additional help for a task beyond his capacity . . . that does not discharge the vessel from the responsibility of supplying adequate personnel available in the *first instance* for performance of the task" (emphasis added).

However, comparative or contributory negligence in maritime cases may not be confused with impermissible assumption of risk arguments. A crewmember cannot be held to assume the risk when ordered to perform a dangerous job. In *Hall v. American SS Co.*, 688 F. 2d 1062, 1069 1983 AMC 134 (6th Cir. 1982), the Sixth Circuit held that a

seaman may not be charged with fault for carrying out orders which result in injury "even if he recognizes probable danger." *See also Salem v. U.S. Lines Co.*, 293 F. 2d 121, 125 (2d Cir. 1961), aff'd in part, reversed in part, 370 U.S. 31 (1962) ("a seaman assumes no risk of employment even of obvious dangers when he acts under the orders of a superior officer"); *Pedersen v. Diesel Tankers, IRA S. BUSHEY, Inc.*, 280 F. Supp. 421, 424 (1967) (Plaintiff was not contributorily negligent in obeying orders he did not assume the risk); *Taylor v. Packard Diving and Salvage Co.*, 342 F. Supp. 365, 371 (E. D. La. 1971), aff'd, 457 F. 2d 512 (5th Cir. 1972) (table) (a seaman does not assume the risk of a lawful order even if it involves risk of injury; nor can defense of assumption of risk be applied under the label of contributory negligence in such a situation). To the extent comparative negligence may be presented to a jury in this case, Rutherford is entitled to a clear instruction distinguishing assumption of risk.

In short, the factors which led the trial court to grant summary judgment may be appropriate for argument to a jury at trial, but they do not conclusively defeat liability, and the summary judgment affirmed below was in error.

B. The Sixth Circuit Erred in Concluding That Rutherford Failed to Present a Jury Question as to Negligence.

The Sixth Circuit affirmed the dismissal on the ground that Rutherford failed to present sufficient evidence to raise a jury question as to whether shipowner LMC was negligent. The Plaintiff's burden under the FELA/Jones Act to establish negligence is a very light one.

This Court's inquiry into whether Plaintiff's Jones Act negligence claim presented a jury question must be conducted within the framework of established case law holding that the burden under the Jones Act and its sister statute, the FELA, to establish a negligence case for the jury, is a light one.[13] The Jones Act and the Federal Employers Liability Act (FELA) have been liberally and deliberately construed to favor the injured plaintiff. In *Leonard v. Exxon Corp.*, 581 F. 2d 522, 524 (5th Cir. 1978), the Court stated:

> Because of the policy of providing an expansive remedy for seamen, submission of Jones Act claims to a jury requires a very low evidentiary threshold; even marginal claims are properly left for jury determination. *Barrios v. Louisiana Construction Materials Company,* 465 F.2d 1157, 1162 (5th Cir. 1972).

As the Second Circuit stated in *Johannessen v. Gulf Trading & Transp. Co.*, 633 F. 2d 653, 656 (2d Cir. 1980), it is "well established that the role of the jury is significantly greater in Jones Act and FELA cases than in common law

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[13] Even in the common-garden, land-based tort action, the question of negligence *vel non* is nearly always held to be a question for the jury, not for the Court. Wright, Miller & Kane, *Federal Practice & Procedure*: Civil 2d § 2729 (1983) ("The language used by courts in denying summary judgment in negligence actions often is strong, indicating that summary judgment rarely is appropriate in these cases."); *Ashby v. Hustler Magazine, Inc.*, 802 F. 2d 856 (6th Cir. 1986) (summary judgment "rarely appropriate in controversies governed by negligence standard"); *Rogers v. Peabody Coal Co.*, 342 F. 2d 749, 751 (6th Cir. 1965) (noting "eminent authority" for doctrine that "issues of negligence are ordinarily not susceptible of summary adjudication").

negligence actions". Correspondingly, a trial court's power to take an issue away from the jury by any form of summary disposition or directed verdict is extremely limited. *Green v. River Terminal Ry. Co.*, 763 F. 2d 805, 806-807 (6th Cir. 1985); *Rodriguez v. Delray Connecting Railroad*, 473 F. 2d 819, 820 (6th Cir. 1973) (quoting Dean Prosser for proposition that verdicts for injured employee under FELA "can be sustained upon evidence which would not be sufficient in the ordinary negligence action"). *See also Harbin Burlington Northern Ry. Co.*, 921 F. 2d 129, 131 (7th Cir. 1990) (reversing grant of summary judgment in FELA case; "It is well established that the quantum of evidence required to establish liability in an FELA case is *much less* than in an ordinary negligence action.") The question of "reasonableness" is the quintessential jury issue. *See Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F. 2d 724, 728 (5th Cir. 1980) ("Questions of negligence under the Jones Act are treated as factual issues").

This is wholly in line with this Court's teaching in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) that "the jury . . . plays a pre-eminent role in these Jones Act cases". Moreover, "Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function." *Id.*

The Accident Report prepared by LMC in this matter [App. 118-119], discussed above, in and of itself provides sufficient evidence to raise a jury question as to the employer's negligence. Implicit in the admissions contained in the Report is the proposition that a reasonable dredge operator such as LMC would have employed the light Kevlar cables and/or provided better training in

cable handling for a novice such as Rutherford. *See Elgin, Joliet & Eastern Ry. Co. v. American Commericial Line, Inc.*, 317 F. Supp. 175, 176 (N.D.Ill. 1970) (evidence which included pilot's admission in accident report that his error was responsible for collision, established negligence, as well).

The only other possible conclusion from the Accident Report is that the steps LMC lists in order to prevent a recurrence of the mishap were extraordinary and unreasonable precautions. At a minimum, there was a jury question as to whether a reasonable dredge operator ought to have had the foresight to take the precautions that a moment's reflection dictated.

CONCLUSION

Petitioner Gene Rutherford respectfully requests that the Court grant a writ of certiorari to the Court below directing reinstatement of his maritime claims for trial before a jury, that the Court award him his costs and attorney's fees and grant such other relief as is fair and just.

DATED this 8th day of April, 2002 at Detroit, Michigan.

Respectfully submitted,

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APPENDIX
TABLE OF CONTENTS

Rutherford v. Lake Michigan Contractors, Inc., 28 Fed.Appx. 395, 2002 WL 22352, 2002 U.S.App.LEXIS 441 (6th Cir. 2002) [Unpublished Opinion] .....App. 1

Opinion And Order On Defendant's Motion For Summary Judgment .....App. 14

Order On Plaintiff's Motion For Reconsideration Of The Court's Order Granting Summary Judgment .....App. 29

Plaintiff's Response To Defendant's Motion For Summary Judgment .....App. 31

Crew List For M/V Shirley Joy .....App. 48

Lake Michigan Contractor's Inc. Employee Accident Form.....App. 49

Letter From Attorney Joseph R. Harrison, LPA ...App. 50

Letter From Judith Schornack-Smith Regarding Dr. Davis' Findings.....App. 56

Medical Records From John A. Davis, Jr., M.D....App. 57

Deposition Transcript Of John A. Davis, Jr., M.D.....App. 63

Deposition Transcript Of Mark David Clapsadle ..App. 73

Deposition Transcript Of Wayne Moon .....App. 84

Plaintiff's Motion For Leave To File Surresponse To Defendant's Motion For Summary Judgment.....App. 89

Brief In Support Of Plaintiff's Motion To File Surresponse To Defendant's Motion For Summary Judgment .....App. 91

APPENDIX
TABLE OF CONTENTS – Continued

Surresponse Brief In Opposition To Defendant's Motion For Summary Judgment.....App. 93

Exhibit 1 – Deposition Excerpt – Mark David Clapsadle .....App. 108

Exhibit 2 – Deposition Excerpt – Mark David Clapsadle .....App. 109

Exhibit 3 – Deposition Excerpt – Mark David Clapsadle .....App. 111

Exhibit 4 – Deposition Excerpt – Mark David Clapsadle .....App. 114

Exhibit 5 – Deposition Excerpt – Mark David Clapsadle .....App. 115

Exhibit 6 – Deposition Excerpt – Wayne Moon .....App. 117

Exhibit 7 – Lake Michigan Contractor's Inc. Employee Accident Form .....App. 118

Exhibit 8 – Deposition Excerpt – Wayne Moon .....App. 120

Exhibit 9 – Deposition Excerpt – Wayne Moon .....App. 121

Exhibit 10 – Deposition Excerpt – Wayne Moon .....App. 122

Exhibit 11 – Deposition Excerpt – Gene A. Rutherford, Jr.....App. 124

Exhibit 12 – Deposition Excerpt – Gene A. Rutherford, Jr.....App. 124

Exhibit 13 – Deposition Excerpt – Gene A. Rutherford, Jr.....App. 126

APPENDIX
TABLE OF CONTENTS – Continued

Exhibit 14 – Deposition Excerpt – Gene A. Rutherford, Jr. ..... App. 127

Exhibit 15 – Deposition Excerpt – Gene A. Rutherford, Jr. ..... App. 129

Exhibit 16 – Deposition Excerpt – Gene A. Rutherford, Jr. ..... App. 130

Exhibit 17 – Deposition Excerpt – Gene A. Rutherford, Jr. ..... App. 131

Plaintiff's Motion For Reconsideration Of Court's Order Granting Motion For Summary Judgment ..... App. 133

Order Granting Motion For Summary Judgment ..... App. 150

Deposition Of Gene A. Rutherford ..... App. 150

Deposition Of Mark David Clapsadle ..... App. 158

Deposition Of Wayne Moon ..... App. 165

Deposition Of John A. Davis, Jr., M.D. ..... App. 169

Exhibit A – Lake Michigan Contractors, Inc., Employee Accident Form ..... App. 173

Exhibit B – *Rapitis v. Sea-Land Corp.*, 921 F.2d 281, 1991 WL 105 (9th Cir. (Wash.)) 1991) [Unpublished Opinion] ..... App. 175

Exhibit C – Crew List For M/V Shirley Joy ... App. 184

Exhibit D – Deposition Of John A. Davis, Jr., M.D. ..... App. 185

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No. 00-1850

UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

GENE A. RUTHERFORD, JR.,

Plaintiff-Appellant,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant-Appellee.

_____/

On Appeal from the United States District Court for the Western District of Michigan

(Filed Jan. 7, 2002)

Before GUY and BOGGS, Circuit Judges; and CARR, District Judge.*

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* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

PER CURIAM. Plaintiff appeals from the grant of summary judgment in favor of defendant, Lake Michigan Contractors, Inc., on his negligence claim under the Jones Act, 46 U.S.C. § 688, and his common law admiralty claim of unseaworthiness. After review, we affirm on other grounds.

I.

Defendant is a dredging company headquartered in Holland, Michigan. Plaintiff was a deckhand on defendant's tugboat, the *Shirley Joy*. The tugboat was being used in a dredging project on the Genessee River in Rochester, New York. Plaintiff injured his back on August 20, 1997, while handling a steel cable on the tugboat.

Three types of vessels are used in the dredging process: a dredge, a barge, and a tugboat. The dredge contains a large crane, which loads debris removed from the riverbed onto a barge. Once loaded, the barge is pushed and/or pulled by a tugboat to a dumping area where the debris is unloaded. The tugboat returns the empty barge to the dredge and maneuvers it into position next to a newly loaded barge. The empty barge is held in place by the crane, while the tugboat ties up to the loaded barge for the purpose of towing it to the dumping area. After the loaded barge is removed, the crane pulls the empty barge next to it, ties up, and resumes the loading process.

The tugboat is tied to the barge by two cables. At the end of each cable is a loop made of hemp, which is put over the cleats on the barge to "marry" the two vessels. Two tugboat deckhands are responsible for attaching or "facing" a barge to the tugboat. One deckhand stays on

the tugboat. He removes the cable from the deck of the tugboat and passes it approximately six to ten feet below to the other deckhand standing on the barge, who attaches the cable to the barge.

Two types of cables were used at different times on the *Shirley Joy*. One type was made of a synthetic material, and the other type was made of steel. The synthetic cable was much lighter than the steel cable. The hoop section of the steel cable used at the time of plaintiff's injury weighed approximately 120 to 150 pounds.

Plaintiff alleges he injured his back when he passed a steel cable from the tugboat to another deckhand on the barge. After experiencing a sharp pain in his back, plaintiff climbed down onto the barge to assist in "unfacing" the dredge line from the loaded barge. While attempting to lift the cable at the stern end of the barge, plaintiff alleges he felt "excruciating pain" and "blacked out." He was removed from the barge by the Coast Guard and taken to an ambulance on shore.

Plaintiff brought this action alleging that he was injured as a result of defendant's negligence and the unseaworthiness of the *Shirley Joy*. The district court granted defendant's motion for summary judgment, and plaintiff appeals.[1]

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[1] Plaintiff also made a claim for maintenance and cure in his complaint. The district court granted summary judgment with respect to maintenance but found a question of fact existed as to whether all cure expenses had been paid by defendant. The parties subsequently settled the maintenance and cure claim, and thus, it is not a subject of this appeal.

II.

We review *de novo* the district court's grant of summary judgment. *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court must determine whether there is "evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

A. Jones Act Negligence

Under the Jones Act, a seaman may recover damages for personal injury caused by a shipowner's negligence. 46 U.S.C. § 688. *See Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 598 (6th Cir. 2001), *cert. denied*, 70 U.S.L.W. 3315 (U.S. Oct. 29, 2001) (No. 01-325). Negligence is determined under the normal ordinary prudence standard. The defendant must breach a duty to protect against foreseeable risks of harm. *Id.* at 599. After negligence is proven, the plaintiff need only show that the shipowner's negligence is the cause in whole or in part of his injuries. In essence, there is a reduced standard for causation between the shipowner's negligence and the seaman's injury. *Id.* at 598.

In reviewing summary judgment under the Jones Act, we are mindful of the "policy of providing an

expansive remedy for seamen who are injured while acting in the course of their employment." *Rannals v. Diamond Jo Casino*, 265 F.3d 442, 447 (6th Cir. 2001) (internal quotation marks and citation omitted). We also recognize that summary judgment is inappropriate if the shipowner's negligence played any part in the seaman's injuries. *Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199, 1204-05 (6th Cir. 1989). Nonetheless, even under the Jones Act, summary judgment is appropriate where plaintiff fails to present evidence showing a genuine issue of material fact as to negligence. *See Doty v. Illinois Cent. R.R. Co.*, 162 F.3d 460, 463 (7th Cir. 1998) (relaxed evidentiary standard does not require a trial when no evidence offered to support an inference of negligence).

Plaintiff argues that the risk of back injury from one person handling a steel cable was foreseeable because other deckhands complained of sore backs. The only evidence of these complaints, however, is plaintiff's own testimony: "I've heard guys say their back is sore from lifting cables." (J.A. at 484.) Such hearsay evidence may not be relied upon by a court ruling on a motion for summary judgment. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 374 (6th Cir. 1999).

Even if plaintiff's hearsay testimony is considered, it is not reasonable to conclude from the description of relatively minor complaints of sore backs that defendant knew or should have known that back injury could result from one deckhand lifting a steel cable. Indeed, plaintiff testified that during his first 19 days working as a deckhand, he had no pain in his back other than being a "little sore." (J.A. at 484.)

Just as importantly, there was no evidence that plaintiff or any crewman brought this issue to defendant's attention. "It is a fundamental principle that, under the Jones Act, an employer must have notice and the opportunity to correct an unsafe condition before liability will attach." *Perkins*, 246 F.3d at 599 (internal quotation marks and citation omitted). Plaintiff asserts that everyone complained and refers to the testimony of another deckhand, who testified:

> Q. . . . . Did you ever find or have any problems with the use of steel cables in the other marine jobs you've had?
>
> A. No. that's all I've ever used.
>
> Q. Prior to August 20th, did Gene Rutherford ever complain about the use of steel cables to you?
>
> A. Well, that was something we all more or less complained, you know, it was just a pain. Once we had the lightweight Kevlar, they were nice, they were easy to handle but, you know, it was a thing of that's what we had, that's what was on there and that's what we used.

(J.A. at 437.) This testimony does not show that any seaman experienced back pain or injury, or that any complaints about possible injuries were brought to defendant's attention.

The crew list for the *Shirley Joy* listed four deckhands. Plaintiff and another deckhand testified, however, that only three deckhands were on board at any one time. Two were on duty, and the third was on call to assist as needed. Plaintiff argues that there is a question of fact as to whether it was negligent to not have four deckhands

on board the *Shirley Joy*. Plaintiff speculates that if four deckhands had been on board then two deckhands may have been available to hand the steel cable from the tugboat to the barge. The district court found that, regardless of whether two deckhands were available, plaintiff did not show that this task could not be safely handled by one deckhand. We agree. There was no evidence upon which a jury could reasonably find that back injury was a foreseeable risk from one person lifting a steel cable.[2]

It was uncontroverted that the use of steel cables was common in dredging operations.[3] Plaintiff argues that

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[2] The district court found that plaintiff had not shown a breach of duty by defendant where there was a third crewman on board and where there was no evidence that plaintiff requested assistance. The district court also found that plaintiff failed to establish that the absence of a fourth seaman played any role in his injury when he failed to ask the existing third deckhand for assistance. Assumption of risk is not a defense to a seaman's claim for injuries under the Jones Act. *See Burden v. Evansville Materials, Inc.*, 840 F.2d 343, 346 (6th Cir. 1988). Whether plaintiff asked for assistance from the third crewman who was unquestionably available to assist goes to the issue of comparative negligence, which allocates fault and liability but is not a bar to recovery. *Id.*

[3] The parties argue at length about why defendant was using steel cables when plaintiff was injured. Defendant asserts that it was because the synthetic cables kept breaking. Plaintiff claims that it was simply a matter of cost or inefficient purchasing practices. The parties do not agree on which type of cable breaks more easily and which type presents more danger to the crew when it breaks. We agree with the district judge that these disputed issues of fact are not relevant because plaintiff was not injured by a snapped cable. The question of why steel was used and whether steel was more or less likely to break

industry standard is not a measure of due diligence. Compliance with industry standard, however, is relevant, if not conclusive, evidence. *See Cherokee Ins. Co. ex rel. Weed v. E.W. Blanch Co.*, 66 F.3d 117, 123 (6th Cir. 1995). There was no evidence that having one deckhand handle a steel cable was either dangerous or an unorthodox method or practice. All that plaintiff showed in this case is that he hurt his back while performing a task that was routinely and frequently performed by deckhands without injury.

Plaintiff finally argues there is a question of fact as to whether defendant's failure to properly train him and failure to require certain safety equipment, *i.e.*, weight belts, constituted negligence. The duty to provide proper training and suitable methods to perform a task is limited to hazards that defendant could have foreseen. *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1571-72 (N.D. Ill. 1996). The district court did not rule on the issue of training and safety equipment. Summary judgment, however, must be affirmed if correct for any reason including one not considered by the district court. *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985).

All of the cases relied on by plaintiff are distinguishable by the existence of evidence of negligence. In *Marmo v. Chicago, Rock Island & Pacific Railroad Co.*, 350 F.2d 236, 239 (7th Cir. 1965), the court held that a jury could reasonably find that the defendant had a duty not to

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does not answer the relevant question on negligence – was it foreseeable that one deckhand lifting a steel cable would injure his back.

place plaintiff in a hazardous position without warning him of what might happen and instructing him on the care to be taken. The plaintiff, however, was performing "dangerous" work, and defendant knew that plaintiff had no knowledge, training, or experience. *Id.* at 238. In *Phillips v. Chesapeake and Ohio Railway Co.*, 475 F.2d 22, 24 (4th Cir. 1973), the court held that where plaintiff received only four days of training, a jury could reasonably find that the employer breached its duty to train. One of the defendant's witnesses, however, admitted that the practice that resulted in plaintiff's injury was "unsafe." *Id.* In this case, by contrast, lifting a steel cable is not inherently hazardous, and a jury could not reasonably so find in light of the evidence that the task was frequently and routinely performed by one deckhand without injury.[4]

Plaintiff worked as a deckhand for approximately three weeks before he was injured. Plaintiff testified that his training consisted of observing another deckhand perform his duties. Plaintiff said that he knew how to lift as a matter of common sense, but he was never taught how to physically handle the cable. He also testified that because of the configuration of the side of the tugboat, he could not bend at the knees while lifting the cable. Plaintiff testified that he did not feel that he was trained properly. He failed to present any probative evidence, however, to support this conclusory and unsubstantiated testimony on training. He offered no evidence as to how his training was defective or what training would have met a minimal

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[4] Plaintiff also cites *Bailey v. Central Vermont Railway*, 319 U.S. 350 (1943). While the Court noted that Bailey was unskilled, his training or lack of training was not at issue in that case.

safety threshold. Even when viewing his testimony in a light most favorable to plaintiff, he failed to raise a genuine issue as to the effectiveness or adequacy of his training.

Plaintiff also relies on an accident report as evidence of negligence in training. In that report, one of defendant's employees noted that the cause of the accident was the "weight of the cable" and "unfamiliarity of cable pulling techniques." It also states that "[s]ynthetic lines that are stronger yet lighter weight will be reinstalled" to prevent recurrence. (J.A. at 147.) While this may be relevant evidence on the issue of causation, it does not address whether it was foreseeable that the type and level of plaintiff's training would result in injury. Causation does not equal breach; they are separate elements, each of which must be proven. *See Zarecki*, 914 F.Supp. at 1575.

With respect to safety equipment, it is not clear whether weight belts were on board the *Shirley Joy*. Plaintiff claims in his brief that there was evidence that a weight belt might have prevented the accident. The evidence, however, is not described or identified. A court has no duty to search the entire record to ensure that there is no genuine issue of material fact. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). The nonmoving party has the burden of directing the court's attention to specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001). Whether weight belts were present or not, plaintiff failed to meet this burden in showing a genuine issue of material fact.

There was no evidence upon which a jury could reasonably find that weight belts would have prevented plaintiff's injury or reasonably find that defendant's failure to provide them constituted negligence.

In effect, the only relevant evidence plaintiff presented in response to the motion for summary judgment was that the steel cable was heavy and that plaintiff injured his back while handling it. He presented no evidence that this was anything more than an unfortunate injury suffered during the execution of a frequent, routine duty of a deckhand. The mere fact of injury is not sufficient. *See Marvin v. Cent. Gulf Lines, Inc.*, 554 F.2d 1295, 1297 (5th Cir. 1977). A plaintiff under the Jones Act must produce some evidence of negligence, which plaintiff has failed to do.

B. Seaworthiness

Under the seaworthiness doctrine, there is an absolute duty to maintain a seaworthy ship, the breach of which imposes liability without fault. *Perkins*, 246 F.3d at 602. The shipowner is not required, however, to furnish an accident-free ship. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). Plaintiff may recover under the theory of unseaworthiness if he demonstrates that the defendant failed to provide a vessel that was reasonably fit for its intended purpose to permit the seaman to perform his task with reasonable safety. *See Lyons v. Ohio River Sand and Gravel Co.*, 683 F.2d 99, 101 (4th Cir. 1982). A shipowner may be held liable when it supplies insufficient equipment or crew. *See Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971). Once unseaworthiness is shown,

plaintiff must prove that the unseaworthy conditions caused his injury. *Id.*

Plaintiff claims there are issues of fact as to whether the use of steel cables, the failure to have four deckhands, and the failure to have weight belts on board rendered the *Shirley Joy* unseaworthy. The district court in this case found that defendant was entitled to summary judgment because plaintiff offered no evidence that the steel cable was defective or that the manner in which it was being handled was unsafe. We agree.

Plaintiff claims that this case is "on all fours" with *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967). In *Waldron*, the Supreme Court reversed the grant of summary judgment where a seaman was injured while carrying a heavy rope. The ship's mate ordered two men to carry the rope. Expert testimony was presented that three to four men, rather than two, were required to carry the rope in order to constitute safe and prudent seamanship. *Id.* at 725.

In stark contrast, there was no evidence, expert or otherwise, in this case that one deckhand could not safely handle a steel cable. There was no evidence on the condition of the steel cable that plaintiff was handling, other than that it was heavier than the synthetic cable, and that it weighed 120 to 150 pounds. Nor was there any evidence that weight belts were necessary to permit the deckhands to lift the steel cable with reasonable safety. It is not sufficient to simply pose the question of unseaworthiness. Plaintiff was required to present evidence upon which a jury could reasonably find that having only one deckhand without a weight belt handle a

steel cable rendered the *Shirley Joy* unseaworthy. Summary judgment was proper in light of the lack of any such evidence.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENE A. RUTHERFORD, JR.,

Plaintiff,

No. 1:98-CV-769

v

LAKE MICHIGAN
CONTRACTORS, INC.,

Defendant.
_____/

OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Feb. 14, 2000)

In his complaint filed in this action, plaintiff Gene A. Rutherford Jr. alleges that on August 20, 1997, while he was employed as a deckhand aboard the tug *Shirley Joy*, a vessel owned and operated by defendant Lake Michigan Contractors, Inc. ("LMC"), he sustained injuries when he slipped while attempting to face the tug to a barge.

Rutherford has asserted claims against LMC based on negligence under the Jones Act, 46 U.S.C. App. § 688 *et seq.*, and unseaworthiness of the vessel under general admiralty and maritime law. The matter is currently before the court on a motion filed by LMC for summary judgment. Plaintiff Rutherford has opposed the motion. For the reasons to follow, the court grants the motion in part and denies it in part.

FACTS

LMC is a dredging company with headquarters in Holland, Michigan. As part of its business, LMC owns and operates various vessels used in its dredging operations. On August 20, 1997, Gene Rutherford was working for LMC as a deckhand aboard one of its vessels, the M/V *Shirley Joy*, a tugboat which LMC was using in a dredging project on the Genesee River in or near Rochester, New York. On that day, Rutherford alleges, he injured his back while assisting in the process of facing the *Shirley Joy* to one of LMC's barges which was being used in a dredging operation.

Three vessels are used during the dredging process: a dredge, a barge, and a tugboat. The Genesee River project involved LMC's dredger, the *Ojibway*. The *Ojibway* is equipped with a large crane, which is used for the purpose of loading a barge with debris removed from the riverbed during dredging. Once a barge is fully loaded with debris, a tugboat is used to push and/or pull the loaded barge to a dumping area in this instance, Lake Ontario), where the debris is disposed. After dumping its load, the tug then returns with the empty barge to the dredging area, where the process is repeated. Specifically, the tug is used to maneuver the empty barge into position next to a loaded barge; the tug then detaches from the empty barge, which is held in place by the dredge's crane; and the tug lines are then "faced" to the loaded barge for purposes of transporting it to the dumping area. After the tug departs with its loaded barge, the dredge pulls the empty barge next to it, attaches, and resumes the loading process.

The barge is attached to the dredge with three cables, or lines, and to the tug by two lines. At the end of each cable is a hoop made of hemp, which is put over the cleats on the barge to "marry" the vessels. The hoop section alone weighs approximately 120 to 150 pounds. The responsibility of connecting and disconnecting the tug to the barge lies with the tug's deckhands. As part of the process of "facing" the barge to the tug, one of the tug's deckhands must remove the cable from the outside deck of the tug, passing it approximately six to 10 feet below to another deckhand, who attaches the cable to the barge. Rutherford alleges that he was injured while handing the bow hemp loop of the cable line to co-worker Mark Clapsadle, another *Shirley Joy* deckhand who was assisting on the barge. According to Rutherford, it was during this handing-down process that he experienced "a sharp pain" in his back.

After experiencing this "sharp pain," Rutherford climbed down from the tug to the large in order to assist the dredging crew in "unfacing" the dredge line from the loaded barge. While attempting to lift the cable at the stern end of the barge, Rutherford further alleges, he felt "excruciating pain" and "blacked out." He was removed from the barge by the Coast Guard and taken to an ambulance ashore.

ANALYSIS

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In evaluating a motion for summary judgment, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party moving for summary judgment bears the burden of establishing the non-existence of any genuine issue of material fact and may satisfy this burden by " 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). While inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Only factual disputes which may have an effect on the outcome of a lawsuit under the applicable substantive law are "material," *Anderson*, 477 U.S. at 248.

JONES ACT AND UNSEAWORTHINESS CLAIMS

Plaintiff Rutherford claims that LMC "was negligent in ordering [him] to single handedly lift 120 lbs. of cable from the bow of the tug." Plaintiffs Response at 6. Rutherford also claims that LMC's vessel was unseaworthy "because it lacked sufficient personnel and contained defective and unsafe equipment." *Id.* at 9. Specifically,

Rutherford claims that the cable, or line aboard the *Shirley Joy*, which was composed of steel, rendered the vessel unseaworthy because the steel line was heavier than another type of synthetic line (known as "Kevlar" line) which had also been used aboard LMC's vessels. In its motion, LMC argues that because Rutherford's claims of negligence and unseaworthiness are based merely on his being required to handle heavy cables, LMC is entitled to judgment as a matter of law on these claims.

"The Jones Act provides a cause of action in negligence for 'any seaman' injured 'in the course of his employment.' " *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (quoting 46 U.S.C. App. § 688(a)). "A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997). "The elements of a Jones Act negligence claim are: duty, breach, notice, and causation." *Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 662 (9th Cir 1997). *See also Brantley v. Hollywood Casino-Aurora Inc.*, No. 96C2082, 1998 WL 513089, at *2 (N.D. III. Aug. 14, 1998) ("A claim under the Jones Act requires a finding of negligent breach of duty and causation").

"Negligence may arise from a dangerous condition on or about the ship, failure to use reasonable care to provide a seaman with a safe place to work, failure to inspect the vessel for hazards or a variety of other breaches of the shipowner's duty of care." *Id.*, 1998 WL 513089, at *3 (citation omitted). As noted above, Rutherford claims that LMC "was negligent in ordering [him] to single handedly lift 120 lbs. of cable from the bow of the

tug." In other words, LMC's negligence is allegedly its failure to use lighter, synthetic cable and/or to provide Rutherford with assistance in handling the cable.

Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 437 (4th Cir. 1999) (citations omitted). However, Rutherford must not only establish LMC's negligence, but also that his back injury was within the range of foreseeable risk from LMC's negligent conduct. *Id.* at 438. Why did the steel cable pose an unreasonable risk of harm, according to Rutherford? Because it was heavy.[1]

In *Chisholm v. Sabine Towing & Transp. Co., Inc.*, 679 F.2d 60 (5th Cir. 1982), the plaintiff seaman alleged that he injured his back while lifting a 40 to 50 pound piece of scrap iron in order to throw it overboard. (The scrap iron had been left in the ship's engine room after repairs. The plaintiff and three co-workers had volunteered to perform overtime work jettisoning the metal.) The district court, which entered judgment in the plaintiff's favor, concluded that the negligence of the defendant vessel owner and the unseaworthiness of the vessel were proximate causes of the plaintiff's injuries. However, a divided panel reversed the decision, concluding that although the

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[1] Plaintiff has also argued that the steel cables were more dangerous than synthetic because the steel can cause serious injury if it "snaps" or breaks during maneuvering. However, the testimony clearly showed that both types of cable can cause injury if they fail. And, more importantly, it is undisputed that Rutherford's injury was not caused by a snapped cable.

failure to secure the scrap iron constituted negligence and made the vessel unseaworthy, the plaintiff had failed to show that the defendant's actions were the cause of his injury. Noting that the debris would have to have been jettisoned in any event, the court stressed that the plaintiff had not been injured by the unsecured debris but rather by disposing of it. *Id.* at 63. The majority decision also noted that the district court had expressly found that the defendant had not been negligent in permitting the plaintiff to undertake the job and that an adequate number of crewmen had been provided to accomplish the task. *Id.* at 61.

Here, Rutherford does not dispute that he was performing a necessary task, and he has not contended that the cables themselves were defective or otherwise not fit for the purpose of facing up the *Shirley Joy* to a barge. He claims merely that lighter cables or the assistance of another crewmember could have been provided by LMC. However, Rutherford has simply presented no evidence that the lighter, synthetic cables would have made his back injury less likely to occur. Moreover, although Rutherford argues that he was "ordered" to perform a strenuous task "single handedly," the evidence presented does not substantiate this contention. Instead, the evidence shows that a third deckhand was present on board the *Shirley Joy* who could, if needed, be enlisted to help Rutherford and/or Clapsadle. *See Lindemann v. Empress Casino Hammond Corp.*, No. 97C8938, 1999 WL 59839, at *4 (N.D. Ill. Jan. 27, 1999) (defendant's motion for partial summary judgment granted, where cocktail server aboard casino boat alleged that defendant's negligence in requiring her to carry heavy loads of glasses caused her back

injury; evidence showed that servers had discretion to determine how many glasses they could safely carry). Rutherford has not shown that he asked for help in order to handle the steel cable, nor has he shown that his task was not one which could have been safely performed without the presence of additional crewmembers.

Rutherford stresses that LMC's crew list for the *Shirley Joy* lists four deckhands, when in reality only three were aboard the vessel at the time of his injury. However, as noted above, although the evidence shows that although a third deckhand was aboard the *Shirley Joy* who could have been summoned to help if necessary, the evidence fails to show a request for the third deckhand's assistance. Under the circumstances, Rutherford has failed to establish that the absence of a fourth deckhand played any role in his injury.

This case is not unlike *Lyons v. Ohio River Sand and Gravel Co.*, 683 F.2d 99 (4th Cir. 1982). In that case, the plaintiff claimed that he had revived a prior back injury while attempting to lift several heavy "shaker plates" in order to obtain a piece of equipment beneath, a "shaker screen." The plaintiff's theory of liability was first, that the ship maintained an insufficient crew to perform the task on the day in question; second, that the captain was negligent in sending only one man to obtain a screen; and third, that the improper storage of the shaker screens rendered the ship unseaworthy. *Id.* at 100. The district court had granted the defendant's motion for a directed verdict on the issues of negligence and unseaworthiness. Affirming the directed verdict on the negligence issues, the appellate court observed as follows:

The claim that the JOE LUCAS maintained an inadequate crew on April 29, 1978, is without merit. The evidence was uncontradicted that a full crew consisted of six men and that on that day there were six men on board. The evidence was also uncontradicted that, while it took up to three or four men to lift a shaker plate, one man could easily carry a shaker screen. Lyons testified that he was not ordered to try and lift the plate himself and conceded that he failed to seek any assistance when he encountered the heavy plate. Finally, while Lyons stated that the rest of the crew was busy at the time he was sent to retrieve the screen, he admitted that, as a general rule, crew members would assist each other when problems arose requiring additional manpower to complete a job. Consequently, there was simply no evidence from which a jury could have concluded that on April 29, 1978, the crew of the JOE LUCAS was inadequate to perform the task of retrieving a shaker screen.

Similarly, there was no evidence to support the claim that the captain was negligent in sending only the plaintiff to secure a screen. As already noted, the testimony clearly indicated that carrying a screen was a one-man job, that Lyons was not ordered to attempt to lift a shaker plate by himself, and that Lyons was never refused assistance in the task when it became apparent that he should not undertake it alone. Furthermore, there was no evidence from which a jury could infer that the captain knew or should have known that Lyons would not be able to obtain the screen by himself or that he would attempt to move a plate without help. Thus, the plaintiff failed to establish a prima

> facie case of negligence. *See Rice v. Atlantic Gulf & Pacific Co.*, 484 F.2d 1318, 1320 (2nd Cir. 1973).

Lyons, 683 F.2d at 100-101.

Here, Clapsadle has testified that during the entire time that he was on the *Shirley Joy* there were only three deckhands – not four – and that only two of the three deckhands generally participated in the process of facing the tug and the barge. Clapsadle Dep. at 18-21. Clapsadle's testimony also clearly indicates that even though the third deckhand was off duty at the time of Rutherford's injury, the on-duty deckhands could have made a decision to call the off-duty deckhand on deck if they believed they needed help. *Id.* at 21. That Rutherford did not seek help suggests that he did not believe be needed it, or that even if he did, he did not notify anyone that he did. Under the circumstances, the court concludes that he has failed to establish breach of a duty by LMC which would render it liable to Rutherford in negligence.

"The maritime duty of seaworthiness requires a vessel owner 'to furnish a vessel and appurtenances reasonably fit for their intended use.' " *Babbitt v. Hanover Towing, Inc.*, 7 F. Supp.2d 650, 652 (E.D.N.C. 1998) (quoting *Mitchell v. Trawler Racer*, 362 U.S. 539, 550, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960)). Moreover,

> A vessel owner . . . may be held liable for a breach of the duty of seaworthiness even without a finding of negligence on his part. . . . The warranty of seaworthiness may be breached by temporary conditions like the improper loading and stowing of cargo as well as by the presence of permanent physical defects in the vessel. . . .

Id. (citations omitted). "As regards equipment, the classic case of unseaworthiness arises when the vessel is either insufficiently or defectively equipped." *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 726 (1967). However, "[u]nseaworthiness extends not only to the vessel but to the crew." *Id.* at 727. Therefore, a shipowner may be held liable under the doctrine of unseaworthiness not only where it supplies unsafe or insufficient gear, but also where it supplies incompetent or insufficient manual assistance. *Id.* at 728.

In *Waldron*, the plaintiff, who fell and injured his back while uncoiling a portion of heavy rope which he and another crewman had been ordered to carry 56 feet to the edge of a ship, alleged that the assignment of an insufficient number of crewmen to perform the task constituted negligence and made the vessel unseaworthy. *Id.* at 725. The Court noted that at trial, the plaintiff had presented expert testimony indicating that three or four men, rather than the two assigned, were required to carry the line safely. *Id.* The district court allowed the negligence issue to go to the jury, which found for the shipowner, but granted a directed verdict to the shipowner on the unseaworthiness issue. An appeal panel had affirmed the decision, but the Supreme Court reversed and remanded the case, holding that the plaintiff was entitled to present his theory of unseaworthiness to the jury. *Id.* at 729.

Here, however, LMC argues that Rutherford offers no expert testimony to support either of his theories of unseaworthiness: that the steel cable was defective, or that the manner in which the cable was being handled

was unsafe.[2] Rutherford in response, argues that expert testimony is not warranted because LMC's breach of duty is "straightforward," By "straightforward," Rutherford apparently means to suggest that a shipowner may be held liable for an unseaworthy vessel merely by asking a seaman to move or lift a heavy object, where the seaman happens to injure his back doing so, even if there is no evidence that the object could not be safely handled by one seaman alone. But a shipowner is not liable simply because it asked a seaman to perform heavy lifting. *See Martinez v. Sea-Land Service Inc.*, 637 F. Supp. 503 (D.P.R. 1986) (plaintiff who allegedly injured his back carrying two cases of soft drinks on his shoulder failed to present prima facie case of unseaworthiness). By "straightforward," Rutherford also apparently means that a shipowner may be held liable for having an unseaworthy vessel merely by choosing equipment composed of steel rather than the same but lighter equipment composed of a synthetic substance.

The evidence shows that LMC could have used synthetic line – if it had chosen to.[3] However, "[t]he test of

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[2] Intertwined with these theories is Rutherford's suggestion that the vessel may have been unseaworthy because it had a retaining wall near the bow which prevented him from bending at the knees while performing his task. However, the presence of this retaining wall was necessary and did not render the ship unseaworthy. As Rutherford's own testimony indicates, "anybody knows that if you got a boat it's got to have a wall or water is going to come in it" and "[i]f you didn't have a wall there you'd fall off the boat or whatever. So evidently it has to be there." Rutherford Dep. at 124.

[3] Rutherford relies heavily on an accident report which was completed on the date of his injury, in which one of LMC's

seaworthiness is whether the ship was, 'in all respects pertinent to the injury, reasonably fit to permit (the seaman) to perform his task . . . with reasonable safety.' " *Lyons*, 683 F.2d at 101 (citing *Lester v. United States*, 234 F.2d 625, 628 (2nd Cir. 1956), *cert. dismissed*, 352 U.S. 983, 77 S.Ct. 384, 1 L.Ed.2d 366 (1957) and *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 213, 83 S.Ct. 1185, 1190, 10 L.Ed.2d 297 (1963)). In this case, as in *Lyons*, the record is void of any evidence from which the jury could conclude that the ship was unseaworthy because LMC chose to use steel cable rather than synthetic. Under the circumstances, LMC is entitled to summary judgment in its favor on the claim of unseaworthiness.

MAINTENANCE AND CURE

"Under general maritime law, when a seaman becomes ill or injured during the period of his service, the shipowner is liable to the seaman for maintenance and cure." *Watters v. Harrah's Illinois Corp.*, 993 F. Supp. 667, 669 (N.D. Ill. 1998) (citation omitted). "Maintenance is the payment by a shipowner to a seaman for the seaman's food and lodging expenses incurred while he is

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managers, Wayne Moon, indicated that LMC might resume use of synthetic lines in order to prevent a re-occurrence of similar injuries. However, LMC has never disputed that it had on occasion used synthetic lines. Instead, LMC's position is that either type of line could have been used, but that the company had ceased using the synthetic lines because they repeatedly broke – a situation presenting a different set of dangers posed by an out-of-control barge. Rutherford's own testimony indicates that the synthetic lines broke on two occasions while he was on the Genesee project. Rutherford Dep. at 32.

ashore as a result of illness or accident." *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 631 (3d Cir. 1990). "Cure involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman[.]" *Nichols v. Barwick*, 792 F.2d 1520, 1523-24 (1986) (citation omitted). The liability for maintenance and cure, which extends during the period when the seaman is incapacitated until he reaches the maximum medical recovery, "is not predicated on the fault or negligence of the shipowner; rather, it is an incident of the marine employer-employee relationship." *Watters*, 993 F. Supp. at 669 (citations omitted).

In its motion, LMC argues that it has already paid Rutherford maintenance for the entire period of his convalescence, that it has paid for all cure expenses that have come due, and that it has agreed to pay for additional cure expenses that were recently presented to it. Therefore, LMC argues, because there are no outstanding maintenance or cure expenses that it is obligated to pay which it has not paid or agreed to pay, it is entitled to summary judgment on this aspect of Rutherford's claim.

In response, Rutherford argues, regarding cure, that it is untrue that LMC has paid or agreed to pay all medical expenses already incurred; he argues that some doctors' bills have not been paid at all, or have been paid by him out of his own pocket. In addition, Rutherford argues that his treating physician has recommended additional surgery, for which Rutherford assesses LMC will be liable. Rutherford apparently does not dispute that LMC's position that it has paid maintenance for the period of his convalescence.

The court finds, based on the foregoing, that a genuine issue of material fact remains regarding whether LMC is liable for additional cure expenses which have been or will be incurred by Rutherford in connection with the injury in question. Therefore, the court will grant LMC's motion for summary judgment on the issue of maintenance, but will deny LMC's motion for summary judgment on the issue of cure.

CONCLUSION

The court grants LMC's motion for summary judgment on plaintiff's claims of negligence, unseaworthiness, and maintenance. The court denies LMC's motion, however, on the claim for cure.

So ordered this 14th day of February, 2000.

/s/ Wendell A. Miles
Wendell A. Miles, Senior Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENE A. RUTHERFORD, JR.

Plaintiff,

v

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.
_____/

No. 1:98-CV-769

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT

(Filed May 9, 2000)

In his complaint filed in this action, plaintiff Gene A. Rutherford Jr. alleges that on August 20, 1997, while he was employed as a deckhand aboard the tug *Shirley Joy*, a vessel owned and operated by defendant Lake Michigan Contractors, Inc. ("LMC"), he sustained injuries when he slipped while attempting to face the tug to a barge. Rutherford asserted claims against LMC based on negligence under the Jones Act, 46 U.S.C. App. § 688 *et seq.*, and unseaworthiness of the vessel under general admiralty and maritime law. LMC filed a motion for summary judgment in its favor, which the court granted in part and denied in part in an Opinion and Order entered on February 14, 2000. Specifically, the court granted LMC's motion for summary judgment on plaintiff's claims of negligence, unseaworthiness, and maintenance, but denied

LMC's motion on the claim for cure. Plaintiff has now field a motion asking the court to reconsider its decision (docket no. 57). The court denies plaintiff's motion with respect to the claims of negligence and unseaworthiness. However, with respect to the issue of maintenance, as plaintiff has noted, maintenance and cure run simultaneously. *See Holmes v. J. Ray McDermott & Co. Inc.*, 734 F.2d 1110, 1117 (5th Cir. 1984) (employer bears the burden of paying maintenance and cure until medical diagnosis confirms that maximum cure has been effected), *overruled on other grounds, Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) Therefore, to the extent that the court has ruled that a genuine issue of fact remains regarding whether LMC is liable for cure expenses which will be incurred by plaintiff in connection with the injury in question (such as for plaintiff's additional surgery), a genuine issue of fact also remains regarding whether LMC is liable for additional maintenance. The court's previous decision should thus be deemed to conclude that no genuine issue remained with regard to past maintenance (i.e., that paid up to the time of the court's ruling).

So ordered this 9th day of May, 2000.

/s/ Wendell A. Miles
Wendell A. Miles,
Senior Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,
Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,
Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 14, 1999)

FACTS

Gene Rutherford is currently 41 years of age and was 38 at the time of accident. He has an 11th grade education, however, no GED. He is married and has two children, ages 20 and 18. Prior to working with LMC he had a number of labor-intensive jobs.

LMC is a dredging company with headquarters in Holland, Michigan and Stewart, Florida. It owns a dozen tugboats, a dozen dredges, and a number of barges. It performs dredging operations in the Great Lakes and on both coasts of Florida. LMC owned all the vessels involved on the Genesee River/Rochester, New York dredging project when Plaintiff sustained his injury.

Mr. Rutherford began working for LMC in May of 1996. He started as a land employee working as a painter, a parts chaser, and a night watchman at the company's

Cleveland yard. For one week in 1996, he worked as a substitute deckhand on the tugboat the *Curly B*. He continued as a land employee until late July or early August of 1998 when he was permanently assigned as a deckhand. The Genesee River project was Mr. Rutherford's first job as a full-time deck hand (Rutherford deposition pg. 20).

LMC had two major vessels on the project: the tugboat the *Shirley Joy* to which Mr. Rutherford was assigned as a deckhand and the dredger the *Ojibway*. Also, there were numerous barges (Rutherford deposition pg. 21). Generally, the project involved the *Ojibway*, which had a crane, dredging the Genesee River and filling the barges. The tug the *Shirley Joy* would then push and/or pull the loaded barge out into Lake Ontario and dump it. It would then return the barge to the dredging area.

The *Shirley Joy* had a crew of five; two captains and three deckhands.[1] Only one captain and two deckhands were on duty at any one time one of the deckhands was designated a "flopper" who was on call 24 hours per day and assigned to assist the crewman assigned to unface the tug (Clapsadle deposition pg. 22). The captains rotated six hour shifts as did two of the deckhands.

Three vessels are utilized during the dredging process, a dredge, a barge and the tug. The dredge, in this case the *Ojibway*, contains a large crane for purposes of loading each barge with the debris removed from the river's bed. Once a barge is fully loaded a tug boat, in

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[1] Per the attached crew list, four deckhands should have been aboard (see attached Exhibit A).

this instance the *Shirley Joy,* is utilized to bring an empty barge and maneuver it into position next to the loaded barge. The tug defaces from the empty barge which is held in place by the crane aboard the dredge. The tug lines are then "faced" to the loaded barge for purposes of removing it to deeper water for dumping. After the tug leaves the dredge pulls the empty barge next to it, attaches to the empty and begins the loading process once again. The barge is attached to the dredge with three lines and to the tug by two lines. The responsibility of connecting and disconnecting the tug to the barge is the responsibility of the deckhands assigned aboard the tug. The cable system between the tug and the barge is rather complicated. The tug has two cables, each of which is attached to a separate winch at its bow. Both cables are looped back to the tug and are, therefore, attached to the tug at two points; the winch and a cleat on the bow. The looping is done to double the strength of the cable (Clapsadle deposition pg. 29). Although, a lighter synthetic line was available it had broken on two occassions and there was no more aboard the tug *Shirley Joy.* The Captain ordered that heavier cable lines then be used. At the end of each cable is a hoop made of hemp which is put over the cleats on the barge to marry the two vessels. The hoop section alone weighs 120 to 150 pounds (Clapsadle deposition pg. 72).

To face the barge to a tug requires one of the two deckhands to remove the cable from the outside deck of the tug and pass it 6-10 feet below to the second deckhand who attaches the cable to the barge after which the Captain operates the winch to pull the cable taught. The light weight synthetic tug lines were replaced by heavy

steel cable at the time of Mr. Rutherford's injury (Clapsadle deposition pg. 30).

Three cables held the dredge to the barge. These cables were permanently attached to the dredge and attached to the tugs bow, stern and midship. These cables are somewhat smaller than the cables used to attach the tug to the barge. It is the responsibility of the tug's deckhands to detach the dredger's cables from the barge and hand them up to the crew on the dredger when the barge is being freed.

At the time of his injury Mr. Rutherford was assigned the job of lifting the bow hemp line to Mr. Clapsadle who was aboard the loaded barge. Mr. Rutherford described the difficulty in lifting this portion of the bow line due to its location. The cable partially hung over the side of the tug over tires which were utilized as the tug's bumpers which required him to lift the loop up and outward from the tug's side. It was impossible for him to stoop to use his legs for lifting due to the fact that there was a retaining wall located around the perimeter of the tug (Rutherford deposition pg. 51, 57). As he handed the loop of the cable line to Mr. Clapsadle below he experienced a sharp pain in his back. He then climbed down from the tug to the barge to assist the dredging crew in unfacing the dredge line from the loaded barge. While attempting to lift the cable at the stern end of the barge he felt excruciating pain and blacked out. He was removed from the barge by the Coast Guard and taken to an ambulance ashore.

ARGUMENT

The Court is well aware that Plaintiff need merely show slight negligence on the part of Defendant to defeat its Summary Judgment Motion in a Jones Act case. In establishing causation under the Jones Act, the Plaintiff's burden is slight and has even been described as "featherweight." *Evans v. United Arab Shipping Co. (S.A.G.)*, 790 F. Supp. 516, 519 (D.N.J. 1992), *aff'd*, 4 F. 3d 207 (3d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994). The language selected by Congress to fix liability is simple and direct. Defendant must bear responsibility if his negligence played any part, even the slightest, in producing the injury. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 77 S. Ct. 443, 448, 1 L.Ed. 2d 493. The standard of causation for unseaworthiness is a more demanding one and requires proof of proximate cause. In either case the Plaintiff's burden has been characterized as very light, even "featherweight."

Vallot v. Central Gulf Lines, Inc., 641 F. 2d 347, 350 (5th Cir. 1981); *Davis v. Hill-Engineering, Inc.* 549 F. 2d 314, 331 (5th Cir. 1977); *Landry v. Two-R. Drilling Company*, 511 F. 2d 138 (5th Cir. 1975), citing *Gilmore & Black, Admiralty (1957)*, § 6-36, p. 311. It is Defendant who bears the burden of demonstrating that there is no actual dispute as to any material fact in this case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1986). Where there exist facts which allow reasonable inference that negligence on the part of the employer would be a causal link to Plaintiff's injury, the matter must be submitted to the trier of facts and Defendant's Motion for Summary Judgment must be denied. *Bunker v. State Boat Operators*, 680 F.Supp. 239, 241 (E.D. La. 1988), *Daughenbaugh v.*

Bethlehem Steel Corp., 891 F.2d 1199 (6th Cir., 1989). In *Bunker* Plaintiff chose to jump five feet from his vessel rather than request a gang plank. Defendant's Motion for Summary Judgment was denied, the court holding the shipowner had a *nondelegable* duty of providing a seaworthy vessel. In *Daughenbaugh* Plaintiff was intoxicated when returning to his vessel and was lost on the dock and later found drowned. The Court denied Summary Judgment noting the "very low evidentiary threshold for submission of a Jones Act case to a jury" *supra* at page 1207; *Leonard v. Exxon Corp.*, 581 F.2d 522, 524 (5th Cir. 1978); *Seary v. E.T. Slider, Inc.*, 679 F.2d 614, 616 (6th Cir. 1982), *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770 (9th Cir. 1981). Issues of negligence are ordinarily not susceptible of Summary adjudication. *Rogers v. Peabody Coal Co.*, 342 F.2d 749, 751 (6th Cir. 1965).

A jury question is provided if the employer's negligence played *any part at all* in the employee's injury. (emphasis added) *Lion v. Farrell Lines, Inc.*, 641 F.2d 765, 770-71 (9th Cir. 1981); *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636 (4th Cir. 1968). In this case viewing the facts most favorably to Plaintiff there is ample evidence of negligence and unseaworthiness of Defendant's vessel and Defendant's Motion must be denied.

Defendant has not established that the evidence is so one sided that they may prevail as a matter of law *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 191 L.Ed. 202 (1986).

As previously addressed in the facts portion of this brief, Defendant was negligent in ordering Mr. Rutherford to single handedly lift 120 lbs. of cable from the bow

of the tug. Mr. Rutherford testified that his normal manner of lifting was to bend his knees and lift with his legs (Rutherford deposition pg. 51). It was impossible to lift in that fashion when removing this particular cable which hung over the side of the bow of the tug and around tires secured to its side utilized as bumpers for the tug (Rutherford deposition pg. 57). The presence of a 2½-3 feet high retaining wall around the circumference of the tug, also prevented a crewmember from bending at the knees (Rutherford Pg. 51). Defendant takes great pains to argue that Plaintiff could have ordered another crewmember who was sleeping at the time out to assist him. Plaintiff was an unlicensed seaman with no authority to give any orders to any other crewmember. All deponents testified that it was the policy of this Defendant to assign only one crewmember to the bow line of the tug while a second crewmember moved from the tug to the barge to retrieve the line. Defendant's Crew List contains the identity of four deckhands when in reality only three were aboard this vessel at the time of Plaintiff's injury leaving the tug shorthanded. Crewmember Mark Clapsadle testified there was never a fourth deckhand on the *Shirley Joy* and that when facing up the tug to the barge, only two crewmembers were ever assigned the job (Clapsadle deposition pages 17-21). The policy of one crewmember being off while the other was on for a six hour shift resulted in the Flopper in this case Mr. Clapsadle to be on duty 24 hours to assist in facing and unfacing these vessels during the dredging procedures. Had the fourth deckhand that was noted on the crew list actually been assigned aboard this vessel he would have been available

to assist Mr. Rutherford in removing the tug's bow line and Mr. Rutherford's injury would not have occurred.

With respect to black belts which Defendant now maintains were always available for the deckhands to utilize, the testimony is to the contrary. Mr. Clapsadle specifically testified that no safety equipment including black belts was ever issued while he was a crewmember. While he believed there was one back support somewhere, he never used it nor was he ever instructed to use it (Clapsadle deposition page 55). Mr. Rutherford testified that he did not recall a black belt (Rutherford deposition pg. 95). Defendant's only defense is that the synthetic line used to face the tug to the barge was unsafe because it broke on two occasions and for that reason the Captain switched to heavier steel cable. Crewmember testimony is that all line snaps, whether Kevlar or cable. This breakage occurs during the course of pulling or pushing barges as testified to by Mr. Clapsadle "you can snap that steel. In fact, like I say, when we were in Dearborn, we lost two of those steel cables." (Clapsadle deposition page 58). Defendant's agent Mr. Moon who was responsible for ordering the lines used aboard Defendant's vessels also conceded that steel cable breaks either through wear or tear or misuse by personnel (Wayne Moon deposition pg. 21). Mr. Moon admits that synthetic line was specially purchased for its strength and it was significantly more expensive than the steel cable and it also required the company to pay for a product called "Partek" to put over the synthetic line so it would not chafe against the bits (Moon deposition pg. 22). Notwithstanding, Defendant argues that the synthetic line was discontinued because it was not strong enough and it chafed against the cleets

(which could have been prevented had hoses or "Partek" been utilized), However, Moon contends synthetic line was discontinued to avoid someone getting hit when the line snapped (Moon deposition pg. 41). In reality as Plaintiff previously testified, steel cable snaps as well and create a much more dangerous situation than a synthetic line. Contrary to Defendant's allegations, the crew of the *Shirley Joy* had made complaints about using the heavy steel cable (Rutherford deposition pg. 61). Clearly credibility issues which are questionable of Mr. Moon's testimony should be left to the trier fact. Defendant's argument with respect to run away barges is irrelevant to the facts at hand. Defendant cannot guarantee a better result when cable is utilized. Defendant's own accident report attributes Mr. Rutherford's injury to the use of heavy lines and recommends reinstallation of lighter lines (see Exhibit B). Indeed the weight of the steel cable would literally pull a crewman overboard (Rutherford deposition page 41). With a total weight of 120-150 lbs. Mr. Clapsadle described that one had to be ready for it, not off balance, standing on a wet or muddy spot. At times the cable got so heavy a crewmember would have to let it drop into the water (Clapsadle deposition page 73).

UNSEAWORTHINESS/DEFENDANT'S BREACH OF DUTY TO PROVIDE A SEAWORTHY VESSEL

Plaintiff maintains that Defendant's vessel was unseaworthy in that it lacked sufficient personnel and contained defective and unsafe equipment. *Robinson v. Showa Kaiun K.K.*, 451 F.2d 688 (1971); *Seashipping Co. v. Sieracki*, 328 U.S. 85 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The

duty to provide a seaworthy vessel extends to its appliances:

> "The vessel's duty to furnish seaman with tools reasonably fit for their intended use is absolute, *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561; *Sea Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099; *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760; *Cox v. Esso Shipping Co.*, 5 Cir., 247 F.2d 629; and this duty is completely independent of the owner's duty under the Jones Act to exercise reasonable care. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed/2d 941." "The differences are stated in *Cox v. Esso Shipping Co., supra*: "One is an absolute duty, the other is due care. Where * * * the ultimate issue [is] seaworthiness of the gear * * * . The owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care or prudence excuses him, whether he knew, or could have known, of its deficiency at the out set of after use. In contrast, under the negligence concept, there is only a duty to use due care, i.e., reasonable prudence, to select and keep in order reasonably suitable appliances. Defects which would not have been known to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325 81 S.Ct. 6 (1960); 24 F.2d, at page 637.

The Supreme Court has held that a ship can be unseaworthy by reason of defective personnel as well as by reason of defective gear. *Hoven v. Interlake Steamship Company*, 570 F.2d 99, 103 (6th Cir. 1978); *Waldron v.*

Moore-McCormack Lines Inc., 386 U.S. 724, 87 S.Ct. 1410 (1967); *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955). Defendant is liable where it failed to provide an adequate number of men for the job task at hand *American President Lines Ltd. v. Welch*, 377 F.2d 501 (9th Cir. 1967). *Waldron v. Moore-McCormack Lines Inc.*, 386 U.S. 724, 1967 AMC 579 (1967) as well as failure to train, instruct or supervise employees *Brown v. Cliffs Drilling Co.*, 638 F.Supp. 1009, 1987 AMC 2190 (E.D. Texas 1986). Thus, where incompetent men inadequate to their calling are utilized, breach of the operator's duty to provide a seaworthy vessel may be found.

Deposition testimony of lay witnesses indicated there were only three of four crewmembers assigned to Defendant's tug (Rutherford deposition pg. 28, Clapsadle deposition pg. 17-21). One deckhand was sleeping in his quarters at the time Plaintiff was assigned the job of lifting the cable single handedly. The only other crewman the flopper, Mr. Clapsadle, was required to move to the barge to receive the line from the tug. The sleeping crewman was not awakened and ordered by the Defendant's supervisor's to assist the working deckhands nor was a fourth deckhand assigned to the vessel. Plaintiff testified that due to the weight of cable, it would be easier to use two crewmen (Rutherford deposition page 17).

Both Mr. Clapsadle and Mr. Rutherford agree that it was safer to use the Kevlar line. It was preferred by the crewmembers and was strong enough for facing purposes. There was simply none left aboard the *Shirley Joy*. Mr. Clapsadle testified that the synthetic line used aboard the *Shirley Joy* was an inferior brand (Clapsadle deposition pg. 74).

Defendant attempts to escape negligence because Plaintiff should have "expected" danger when required to work as a deckhand for Lake Michigan. Plaintiff was an inexperienced seaman who did not receive training until after he began working full time as a deckhand (Rutherford deposition pg. 12 & pg. 44). Defendant cannot escape liability or even argue contributory negligence because a seaman assumes the risk of undertaking his duties. The circumstances and nature of a seaman's calling as contrasted with the calling of employees ashore is reflected in the prohibition in law of the vessel owner asserting the affirmative defense of assumption of risk in the guise of contributory negligence in defending actions of unseaworthiness and negligence under The Jones Act. *The Arizona v. Anelich*, 298 U.S. 110, 56 S. Ct. 707, 80 L. Ed 1075, 1936 AMC 627 (1936); *Beadle v. Spencer*, 298 U.S. 124, 56 S. Ct. 712, 80 L. Ed. 1082, 1936 AMC 635 (1936); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265, 1939 AMC 1 (1939); *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed 561, 1944 AMC 1 (1944).

Defendant miscategorizes assumption of risk as comparative negligence, but such misdeed on the part of Defendant scarcely vanquishes that prohibition. A seaman may not be comparatively negligent because he proceeds in an unsafe area of the ship, or uses an unsafe appliance, in the absence of showing that there was a safe alternative available to him. *Tolar v. Kinsman Marine Transit Co.*, 618 F. 2d 1193, 1195 (6th Cir. 1980) In the instant cause, Plaintiff had no alternative but to proceed with his duties in an unsafe area of the ship which could have easily been repaired but was ignored by his superiors.

Plaintiff cannot be held guilty of negligence unless there is evidence of some negligent act or omission by the Plaintiff other than his knowledgeable acceptance of a dangerous condition, *Hall v. American Steamship Co.*, 688 F 2d 1062 (6th Cir. 1982); *Tolar v. Kinsman Marine Transit Co.*, 618 F 2d 1193 (6th Cir. 1980); *Rivera v. Farrell Lines, Inc.*, 474 F. 2d 255, 257, 258 (2d Cir. 1973).

Lastly, insofar as Plaintiff proceeded in his duties in response to orders by one or more of Defendant's officers, he acceded to the request or direction of the responsible representative of the employer that he work at a dangerous job, or in a dangerous place or under unsafe condition, *Hudson Waterways Corp. v. Schneider*, 365 F. 2d 1012 (9th Cir. 1966); *Williams v. Brasea, Inc. and Vessel Ciapesc I.* 497 F 2d 67 (1974); *Hall v. American Steamship Co., supra.* There is no evidence that Plaintiff was performing his duties in an unsafe manner. Defendant's own business record, their accident report, recommends that lighter synthetic line be used.

Defendant cites numerous case law which are clearly distinguishable. Defendant relies on *Roche v. USA* 1990 A.M.C. 2696 (E.Dist. LA 1990) where Plaintiff a Bosun, had the authority to order other men out to assist him in his duties and he failed to do so. Furthermore, the Court held that Plaintiff was an experienced seaman and that the crew was not shorthanded unlike the facts before us. Mr. Rutherford had no authority to order men out to assist him. The vessel clearly was shorthanded, Defendant's own crew list indicated that four crewmembers should have been assigned to this vessel and only three were aboard with one off duty and sleeping at the time of Plaintiff's injury. In *Martinez v. Sea Land Service, Inc.* 637

F. Supp. 503 (D. Puerto Rico 1986) Plaintiff's case was dismissed, the Court finding Plaintiff's testimony to be not credible because his injury was not reported until nine months after it allegedly occurred. Plaintiff was assigned the job of carrying boxes of soda for the ship and he took it upon himself to carry two at a time. In this case Mr. Rutherford had no option but to use the heavy steel cable when the Captain ordered the lighter synthetic line be replaced with cable. In *Lion v. Ohio River Sand and Gravel Co.* 683 F. 2d 99 (4th Cir., 1982) the Court held that a full crew consisted of six men and six men were on board Plaintiff's vessel the day he was injured. Further, there was evidence that only one crewman was needed, to carry the screen which Plaintiff was ordered to lift. Unlike Mr. Rutherford's situation where Mr. Rutherford specifically testified that it would be easier for two men to handle 120-150 lbs. of cable. It was negligent to assign only one crewmember to such a task as emphasized by the testimony of Mr. Clapsadle previously cited when he testified that one would have to brace themselves' and "be ready for it" or be forced to drag it overboard (Clapsadle deposition pg. 73). In *Carleno v. Marine Transport Lines, Inc.* 317 F. 2d 662 (4th Cir., 1963) Plaintiff's case was dismissed when the Court found that the weight of the nylon hoses he was required to lift was approximately 200 lbs. but six crewmembers were present to handle the job. Similarly in *Chisholm v. Sabine Towing and Transportation Co., Inc.* 679 F. 2d 60 (5th Cir., 1982) where Plaintiff was assigned the duty of lifting 40-50 lb. pieces of scrap metal, the Court specifically found that an adequate number of crewmen was assigned the task of disposing the metal. These cases are clearly distinguishable from

the situation at present where the ship was short and only one man was assigned a deckhand duty of handling 120-150 lb. cable.

MAINTENANCE AND CURE

Defendant maintains that all bills for Plaintiff's maintenance and cure have been paid or alternatively that Defendant has agreed to pay for all such bills. This is simply untrue as evidenced by the attached correspondence. Counsel for Defendant has been advised of outstanding doctors bill in the amount of $354.00 for which Plaintiff is now being haunted by collection agencies, and unpaid prescriptions in the amount of $181.96 which Plaintiff paid out of pocket (see Exhibit C), most importantly Mr. O'Donnell was provided an updated report of Plaintiff's treating physician Dr. Davis who indicates additional surgery is now necessary. Dr. Davis awaits the Defendant's preapproval for payment so that the surgery may be scheduled forthwith (see Exhibit D). To date Plaintiff's counsel has received no response from Defense counsel's office with respect to future surgery.

CONCLUSION

Given the numerous issues of material fact which remain at issue, Defendant's Motion must be denied.

Respectfully submitted,

THE JAQUES ADMIRALTY LAW FIRM, P.C.

BY: /s/ Judith A. Schornack-Smith
JUDITH A. SCHORNACK-SMITH
MICHAEL J. CONNOR
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

Dated: October 13, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and says that on the 13th day of August, 1999, she served *Plaintiff's Response To Defendant's Motion For Summary Judgment* and *Certificate of Service* in the above matter and a copy upon the following via UPS Overnight delivery:

John A. O'Donnell
Belgrade and O'Donnell, P.C.
311 South Wacker Dr., Ste. 2770
Chicago, IL 60606

/s/ Sherri S. Rivard
SHERRI S. RIVARD

Subscribed and sworn to before me
this 13th day of October, 1999.

/s/ Lori Ann Childress
NOTARY PUBLIC
LORI ANN CHILDRESS
Notary Public, Oakland County, MI
My Commission Expires Jan. 23, 2001

M:\wp\sherri\judy\rutherfo\pleading\Proof.11

CREW LISTS FOR:
M/V SHIRLEY JOY (FOR WEEKS ENDING 8/16 AND 8/23/97)

Tug Captains:

Rix Robinson
9673 Fleming Grant Road
Sebastian, FL 32976
Phone 407-664-8126

Thomas Dawes Jr.
930 Remington Dr.
N. Tonawanda, NY 14120
Phone 716-743-0237

Thomas Dawes Jr.
1369 Sweeney
N. Tonawanda, NY 14120
Phone 716-694-0606

Deckhands:

Steve Byrom
8040 Robertson Place
Highland, IN 46322
Phone 219-838-3751

Mark Clapsadle
580 Oliver St. #2
Tonawanda, NY 14120
Phone 716-695-8751

Gene Rutherford
3053 W. 51st St.
Cleveland, OH 44102
Phone 216-651-5874

Patrick Smith
3402 W. 148th St.
Cleveland, OH 44111
Phone 216-251-1367

NOTE: Crews were same both weeks with the exception that Dawes Sr. worked 8/11-8/16 w/e 8/16/97 and 8/17-8/20 w/e 8/23/97 and Dawes Jr. worked 8/10-8/11 w/e 8/16/97 and 8/20/23 w/e 8/23/97.

LAKE MICHIGAN CONTRACTOR'S, INC.
EMPLOYEE ACCIDENT FORM

Injured Employee Gene Rutherford

Employee Number _____

Job Title Deckhand

Accident Location Rochester, N.Y.

Injury Date 8/20/97

Time 1:45 AM-PM

Date Reported 8/20/97

Last Day Worked 8/20/97

Name & Address of Doctor/Hospital Rochester General Hospital 1425 Portland Ave. Rochester, N.Y.

Did employee return to work? [ ] Yes [X] No.

If yes, date returned _____

Describe injury or alleged injury Sharp pain in lower back.

Description of accident While pulling a length of cable employee felt pain in lower back.

Witnesses Mark Clapsadle on site but not eyewitness.

Did equipment malfunction? [ ] Yes [X] No.

If yes, describe on reverse side.

Describe damage to equipment or property None

What caused the accident? (See cause and effect factors on cover) Weight of cable & unfamiliarity of cable pulling techniques.

What action has been or will be taken to prevent recurrence? Synthetic lines that are stronger yet lighter weight will be reinstalled (continue on reverse side)

Supervisor and Dept. Labor Division Mgr.

Date 8-20-97

EMPLOYEE SIGNATURE /s/ Gene A. Rutherford, Jr.

DATE 8-20-97

Joseph R. Harrison Company, LPA

[Address Omitted In Printing]

June 29, 1999

673397/1/ID# 301898
GENE RUTHERFORD
3053 W 51 ST
CLEVELAND OH 44102

RE: Past-due Account of
Metro Health

Account No. -
3433262-414783
Patient Name -
Rutherford, Gene - 62
Service Date: 02/18/99
Amount Due: $42.00
Interest: $ 0.00
Amount Paid: $ 0.00
Balance Owed: $42.00

Dear Gene Rutherford:

This office represents the above named client in the collection of their past-due accounts.

They have forwarded to this office a past-due account in the amount of $42.00. We are, therefore, asking that you forward a check to this office in the amount listed above or contact this office with any facts indicating you may not owe this amount. Any member of my staff will be pleased to work with you.

For convenience of all concerned parties, VISA and MASTER CARD are accepted for payment on your account. To take advantage of this convenient method of payment, simply call our office with your credit card number.

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt to be valid. If you notify this office in writing, we will obtain verification of the debt and mail you a copy of such verification. We may contact you during this 30-day period, but such contacts are not intended to overcome your right to verification.

This communication is from a debt collector. This is an attempt to collect a debt. Any information obtained will be used for that purpose.

Sincerely,

/s/ Joseph R. Harrison
Joseph R. Harrison, Attorney At Law

----Please return this portion of the letter with your payment.----

673397/1/ID# 301898
Gene Rutherford
3053 W 51 St
Cleveland OH 44102

Metro Health
Acct. No.: 3433262-414783
Patient:
Rutherford, Gene – 62
June 29, 1999

Amt Paid: _____

METROHEALTH EMERGENCY ASSOC
P.O. BOX 931844
CLEVELAND OH 44193-1185

[LOGO] MetroHealth System

Professional Services

STATEMENT

PATIENT NAME GENE RUTHERFORD PAGE 1

BILL DATE	ACCOUNT NO.	AMOUNT PAID
09/20/99	0414783	

06

0414783
GENE RUTHERFORD
3053 W 51ST ST
CLEVELAND, OH 44102-4507

PLEASE SEND PAYMENT TO:

METROHEALTH EMERGENCY ASSOC
P.O. BOX 931844
CLEVELAND OH 44193-1185

PH: 216-778-4545 FAX: 216-778-3318

PLEASE REMOVE AND RETURN THIS TOP PORTION WITH YOUR PAYMENT

PLEASE SAVE THIS STATEMENT FOR YOUR TAX AND MAJOR MEDICAL RECORDS

DATE OF ACTIVITY 07/18/99

DESCRIPTION EMERGENCY DEPT VISIT

PROVIDER EFFRON M.D., D

INSURANCE DUE	PATIENT DUE
	204.00

DATE 09/20/99

PATIENT NAME RUTHERFORD, GENE

ACCOUNT NO. 0414783

PAY THIS AMOUNT ☞ 204.00

YOU MAY BE BILLED SEPARATELY FOR HOSPITAL AND FOR OTHER PHYSICIAN SERVICES

PAYMENTS RECEIVED
AFTER THIS DATE WILL
APPEAR ON YOUR NEXT STATEMENT.

MAKE CHECK PAYABLE TO:
METROHEALTH DEPT. OF EMERGENCY
216-778-4545

PLEASE WRITE YOUR ACCOUNT NUMBER ON YOUR CHECK

IMPORTANT MESSAGE REGARDING YOUR ACCOUNT

THANK YOU FOR CHOOSING THE METROHEALTH SYSTEM FOR YOUR HEALTH CARE NEEDS. PLEASE PAY THE AMOUNT CURRENTLY DUE.

WE ACCEPT: VISA DISCOVER MASTER CARD

PLEASE SEE REVERSE SIDE FOR INFORMATION REGARDING HEALTH INSURANCE AND STATEMENT

medic
discount drugstores

Phone (216) 651-20
4507 CLARK AVE.
CLEVELAND, OH 44102

For all prescription questions please call the pharmacist during regular hours

RX732721 TOM 06/01/1999
N:RUTHERFORD, GENE JR (8/24/58)
A:3053 W 51ST ST
A:CLEVELAND, OHIO
ARTHROTEC 75 TABLET EC Q:20
REFS: 0.00 00025-1421-60 1X 601 338
DR DAVIS, NICK DAW=
CASH

PRICE
33.98

732721 0 TOM 06/01/1999
Total 20 ARTHROTEC 75 TABLET EC
33.98 RUTHERFORD. GENE JR 33.9

---

medic
discount drugstores

Phone (216) 651-2022
4507 CLARK AVE.
CLEVELAND, OH 44102

For all prescription questions please call the pharmacist during regular hours

RX713839 TOM 02/19/1999
N:RUTHERFORD, GENE JR (8/24/58)
A:3053 W 51ST ST
A:CLEVELAND, OHIO
NEURONTIN 100MG CAPSULE Q:10
REFS: 1.88 00071-0803-24 15W 16W 336
DR METROHEALTH,
CASH

PRICE
8.98

Total
8.98

---

medic
discount drugstores

Phone (216) 651-2022
4507 CLARK AVE.
CLEVELAND, OH 44102

For all prescription questions please call the pharmacist during regular hours

RX747452 TOM 07/22/1999
N:RUTHERFORD, GENE JR (8/24/58)
A:3053 W 51ST ST
A:CLEVELAND, OHIO
ACETAMINOPHEN/COD #3 TA Q:60
REFS: 0.00 51285-0601-05 1X 364 671
DR M, H058644 DAW=
CASH

PRICE
15.49

Total
15.49

---

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4507 CLARK AVE.
CLEVELAND, OH 44102

For all prescription questions please call the pharmacist during regular hours

RX746587 TOM 07/19/1999
N:RUTHERFORD, GENE JR (8/24/58)
A:3053 W 51ST ST
A:CLEVELAND, OHIO
ROXICET 5/325 TABLET Q:20
REFS: 0.00 00054-4658-29 1X 364 671
DR M, H017293 POGGI, NANCY DAW=
CASH

PRICE
11.69

Total
11.69

---

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4507 CLARK AVE.
CLEVELAND, OH 44102

For all prescription questions please call the pharmacist during regular hours

RX732721 TOM 05/21/199
N:RUTHERFORD, GENE JR (8/24/58
A:3053 W 51ST ST
A:CLEVELAND, OHIO
ARTHROTEC 75 TABLET EC Q:20
REFS: 0.33 00025-1421-60 1X 601 338
DR DAVIS, NICK DAW=
CASH

PRICE
33.98

732721 0 TOM 05/21/199
Total 20 ARTHROTEC 75 TABLET EC
33.98 RUTHERFORD. GENE JR

---

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4507 CLARK AVE.
CLEVELAND, OH 44102

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RX713839 ALL 02/22/1999
N:RUTHERFORD, GENE JR (8/24/58)
A:3053 W 51ST ST
A:CLEVELAND, OHIO
NEURONTIN 100MG CAPSULE Q:10
REFS: 1.77 00071-0803-24 15W 16W 336
DR METROHEALTH,
CASH

PRICE
8.98

713839 0 ALL 02/22/1999
Total 10 NEURONTIN 100MG CAPSULE
8.98 RUTHERFORD, GENE JR 8.9

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RX PHARMACY	1N	33.98
TOTAL		33.98
CASH		40.00
CHANGE		6.02

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WEDNESDAY IS SR. CITIZEN DAY AT MEDIC!
-ANY WARRANTY IS PURSUANT TO CONTRACT-
MAY 12, 1999 12:30 PM

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4507 CLARK AVE.
CLEVELAND, OH 44102

For all prescription questions please call the pharmacist during regular hours

RX760636 TOM 09/23/1999
N:RUTHERFORD, GENE JR (8/24/58)
A:3053 W 51ST ST
A:CLEVELAND, OHIO
CELEBREX 200MG CAPSULE Q:7
REFS: 1.88 00025-1525-31 704 14W 364
DR DAVIS, JOHN A DAW=
CASH

PRICE
19.39

Total
19.39

medic
discount drugstores

Phone (216) 651-2022
4507 CLARK AVE.
CLEVELAND, OH 44102

For all prescription questions please call the pharmacist during regular hours

RX760623 TOM 09/23/1999
N:RUTHERFORD, GENE JR (8/24/58)
A:3053 W 51ST ST
A:CLEVELAND, OHIO
ACETAMINOPHEN/COD #3 TA Q:60
REFS: 1.00 51285-0601-05 1X 364 671
DR DAVIS, JOHN A DAW=
CASH

PRICE
15.49

Total
15.49

THE JAQUES ADMIRALTY LAW FIRM

ATTORNEYS AND COUNSELORS AT LAW

MARITIME LAW ADVOCATES

NATIONAL HEADQUARTERS

1370 Penobscot Building • Detroit, Michigan 48226-4192

[Names Omitted In Printing]

September 30, 1999

John A. O'Donnell, Esq.
Belgrade & O'Donnell, P.C.
311 S. Wacker Drive, Ste. 2770
Chicago, IL 60606

RE: Gene A. Rutherford, Jr. v. Lake Michigan Contractors, Inc.
Case No. 98CV769

Dear Mr. O'Donnell:

Enclosed please find correspondence of September 27, 1999 from Dr. Davis, mylogram, report, cat scan report, as well as the office note of September 23, 1999. Please forward this to your client for approval and contact me immediately so that we may proceed with getting Mr. Rutherford scheduled for the surgery.

Sincerely,

/s/ J. A. Schornack-Smith
Judith A. Schornack-Smith

Encls.
JSS/ssr

GENE A. RUTHERFORD, JR.
MHMC# 0414783

9/23/99 – MHMC

He returns for follow-up clinic evaluation for his lumbar disc herniation and his previous laminectomy at L4-5. He is still persisting with leg symptoms, burning and pain. He recently had a lumbar myelogram and post myelogram CT scan. This indicates severe stenosis at the L3-4 level. I think that most of this is due to some changes in the biomechanics of his spine at L4-5 as a result of his discectomy and laminectomy. He also has some stenosis with disc protrusion at L5 S1. There may be a recurrent disc herniation at L4-5 with some epidural scarring that is affecting his nerve root. I think ultimately he is going to need a thorough decompression for L3 to the sacrum and potentially a fusion should instability be created. We had a long discussion regarding this today.

From a physical exam standpoint he is unchanged. I made him a copy of his myelo CT and gave it to him today. I also told him I would dictate a letter to his attorney and enclose a copy of his myelo CT with that. I will plan on seeing him back once we get approval for the surgery. He has tried Neurontin before without relief and I don't think that epidural steroids are going to significantly improve this for him. Once we get approval I told him we would meet again to discuss the surgery.

/s/ John A. Davis Jr.
John A. Davis Jr., M.D.

Cc: Medical records
Patient's Attorney: The Jaques Admiralty Law Firm (Fax: 313-961-5275)
Attorney for the other side: John A. O'Donnell (Fax: 312-360-9550)

THE METROHEALTH SYSTEM
METROHEALTH MEDICAL CENTER
DEPARTMENT OF RADIOLOGY

MR# 0414783
Name:
RUTHERFORD, GENE A, JR
DOB: 08/24/1958 Sex: M

Loc: 192
Enc: 004220281

Attending MD:
JOHN A. DAVIS, JR.

DIAGNOSTIC RADIOLOGY

Requesting MD:
JOHN A. DAVIS, JR.

RADIOLOGY CONSULTATION

* * *

Diagnosis: lumbar stenosis/disc
History: lbp w/rt>lt leg pain, s/p lumbar laminectomy 1/06/98

LUMBAR MYELOGRAM
(MC)MIM005 09/09/1999 8:55 AM Acc #2332022

FINDINGS OF CT: There is a borderline spinal stenosis diffusely in the lumbar canal, with shortened pedicles and somewhat bulky facets. No disc herniation or sac compression is identified at the T12-L1, L1-2 or L2-3 levels.

At L3-4, there is diffuse disc bulging, as well as prominence of facets and ligamentum flavum. These

changes result in moderately severe canal stenosis, as well as mild narrowing of both L3 neural foramina.

Laminectomy defect is noted at L4-5. There is no overall canal stenosis. However, there is soft tissue in the epidural space anteriorly and along the right lateral aspect of the thecal sac, with absent filling of the proximal right L5 nerve root sleeve. This may represent recurrent disc herniation or scarring related to the initial surgery. There is moderate narrowing of the L4 foramina bilaterally secondary to end-plate spurring and facet hypertrophy.

At L5-S1, there is no canal stenosis or sac compression. No significant foraminal narrowing is identified.

IMPRESSION:

1. Moderately severe canal stenosis at L3-4 due to borderline congenital spinal stenosis, with superimposed disc bulging and posterior element hypertrophy. Mild bilateral foraminal narrowing is also present at this level.

2. Laminectomy defect is noted at L4-5. There is soft tissue in the anterior and right lateral aspects of the epidural space, with obliteration of the right L5 nerve root sleeve. This may reflect recurrent disc herniation or epidural scarring from the previous surgery. Moderate foraminal narrowing is present bilaterally as a result of spurring and facet hypertrophy.

Interpreted by: Judith E. Simon, M.D. Signed:
Judith E. Simon, M.D.
Authenticated on: 09/09/1999 4:31 PM by
Judith E. Simon, M.D.
Transcribed on: 09/09/1999 3:31 PM by

Daria Tobasko
Finalized on: 09/09/1999 4:31 PM by
Judith E. Simon, M.D.

THE METROHEALTH SYSTEM	MR# 0414783
METROHEALTH MEDICAL CENTER	Name: RUTHERFORD, GENE A, JR
DEPARTMENT OF RADIOLOGY	DOB: 08/24/1958 Sex: M
Loc: 192	Enc: 004220281
Attending MD: JOHN A. DAVIS, JR.	DIAGNOSTIC RADIOLOGY
Requesting MD: JOHN A. DAVIS, JR.	*RADIOLOGY CONSULTATION*

* * *

Diagnosis: lumbar stenosis/disc
History: lbp w/rt>lt leg pain, s/p lumbar laminectomy 1/06/98

LUMBAR MYELOGRAM
(MC)MIM005 09/09/1999 8:55 AM Acc #2332022

CT L-SPINE W/CON POST MYELO
MCT106 09/09/1999 10:02 AM Acc #2332026
SURG-INJECTION LUMBAR SPINE
MXR010 09/09/1999 8:56 AM Acc #2332407
PATIENT MON PULSE OXIMETRY SIM
MXR160 09/09/1999 8:57 AM Acc #2332408

TECHNIQUE OF MYELOGRAM: After informed consent was obtained, the back was prepped and draped in the usual sterile fashion. Lumbar puncture was performed at the L2-3 level using a 22-gauge spinal needle

and fluoroscopic guidance. After CSF flow was confirmed, a total of 17 cc of Omnipaque-180 was injected in the subarachnoid space, and the needle was withdrawn.

The patient was observed in Radiology for four hours before being discharged to home in good condition.

FINDINGS OF MYELOGRAM: There is significant effacement of subarachnoid space at the L3-4 level, with circumferential compression of the thecal sac.

Prominent degenerative changes are noted at the L4-5 disc level, with disc space narrowing and end-plate spurring. There has been posterior decompression, and no overall canal stenosis is identified at this level. However, there is mild ventral compression of the thecal sac. On the oblique views, there is greater compression of the right ventral aspect of the thecal sac, and no filling of the right L5 nerve root sleeve.

No sac compression or root sleeve compression is seen at the L5-S1 level.

TECHNIQUE OF CT: Contiguous 4 mm-thick axial images were obtained from the bottom of T12 to the top of the sacrum.

[LOGO] MetroHealth Medical Center
2500 MetroHealth Drive
Cleveland, Ohio 44109-1998

216 778-7800

September 27, 1999

The Jaques Admiralty Law Firm
P.D., 1370 Penobscot Building
Detroit, Michigan 48226

RE: GENE A. RUTHERFORD, JR.
DOB: 8/24/58

Dear Sir,

This is a letter on behalf of my patient Mr. Gene Rutherford, Jr. He recently underwent a lumbar myelogram and post myelogram CT scan. This indicates a significant amount of stenosis at the L3-4 level with a recurrent disc herniation at L4-5 and some epidural scarring which is significant. I think he has a disc bulge also at L5 S1. I think that the worsening of his stenosis up above is due to the fact that he has undergone a discectomy and laminectomy at L4-5 and these segments have had to work harder to compensate for biomechanical change within the spine. As a result, I think he is going to now need a laminectomy at L3 and L5 with a thorough decompression of the nerve roots and a possible fusion. I think this is all related to his previous work related injury at the L4-5 disc herniation. I would appreciate your support in an attempt to get this approved so that we can progress with his surgery. Should you have any questions, please don't hesitate to call.

/s/ John A. Davis Jr.
John A. Davis Jr., M.D.
JAD/pb

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENE A. RUTHERFORD, JR.,

Plaintiff,

-vs-

File No.: 1:98 CV 769

LAKE MICHIGAN CONTRACTORS, INC.,

HON. WENDELL A. MILES

Defendant.
_____/

Deposition of GENE A. RUTHERFORD, JR. taken under the provisions of the Federal Rules of Civil Procedure before Carrie S. Clark-Berry (CSR-4402), Certified Shorthand Reporter and Notary Public, at Sukup & Grimm, 146 Monroe Center, NW, Suite 1526, Grand Rapids, Michigan, on Thursday, May 6, 1999, commencing at 11:32 a.m., pursuant to Notice.

* * *

[12] Q Yes.

A Yeah. A little over a week, yeah.

Q Can you tell me where you worked for that week or so?

A Lorain, Ohio.

Q Was there a project going on there?

A Yeah. The Black River. It was dredging.

Q Were you working on a – assigned to a particular vessel for that week or a little more than a week?

A Yeah. I was on the Curly B, a tug.

Q And generally what were your duties and responsibilities on the Curly B during that project?

A Deckhand. I would hook up the barges to the boat to push them to take them to the dump site.

Q Anything else?

A Also did cleaning on the boat, painting if it was needed.

Q Did you receive any training at that time for any of those duties?

A I just was showed as I went, you know. Not really what you would call training, you know.

Q Who showed you how to do things?

A The other deckhand.

* * *

[17] A What's that?

Q Is it just when you're a deckhand on the boat handling the cables that you can't –

A Exactly.

Q – bend at the knees?

When you're handling the cable and handing it either down or up to the deckhand, how much of the cable are you actually holding?

A Say you – see, you got the cable – a part of the cable in each hand. You have like an eye, you know. I would say four or five feet maybe of eyes that you got to hand up or hand down.

Q And the eye is basically what hooks onto the – over the bit on the boat?

A On the barge, yes.

Q On the barge, yes.

A Okay.

Q Approximately how much would the four feet of the cable with the eye that you're holding weigh?

A I don't really know what it would weigh.

Q Was it – did you – strike that.

Was it ever, in your opinion, too much for one man to be holding?

A Well, it would be easier with two men because it

* * *

[20] deckhand in '97 did you do any sort of training at that time?

A No.

Q Were you continuing to learn as you went along?

A Yes.

Q Or had you learned up to that time all there was to learn about being a deckhand?

A No, I never learned it all. There's a lot to decking.

Q Okay. And when you started as a full-time deckhand then the first project you worked was where?

A Rochester, New York.

Q And what vessel were you on?

A Shirley Joy.

Q Can you describe the project that was going on in Rochester, New York?

A We were dredging the Genesee River.

Q Can you explain a little bit what dredging the river entails?

A It's where they take the mud and debris out of the river so the bigger vessels can come through.

Q Was this project being done entirely by Lake Michigan Contractors?

[21] A Yes, sir.

Q How many vessels did that involve?

A The Shirley Joy; the Ojibway, which was the dredger; and I'm not sure how many barges they had up there.

Q Did each of those various vessels have their own – have its own crew?

A Yeah.

Q Okay. Including the barges? Or did the barges –

A Well, the barges, the tug would take care of that. The tug would do the – the Ojibway would have a full load, and they would radio the captain on the boat to bring an empty. We would take the full one out and replace it with an empty, and we'd have to take the full one out and dump it.

Q So there was a separate crew on the Ojibway; is that right?

A Yes, sir.

Q Do you know who was on that crew?

A You're asking that – is that when I got hurt or – I mean they got shifts on there.

Q Well, based on the Complaint in this case and some other documents you got hurt around August

* * *

[41] A Yup.

Q Okay. At any time when you were working on the Curly B did you feel that the facing up of that boat or the connecting or disconnecting of the barge with the dredge was – presented any danger to the deckhands?

A You mean as far as lifting them and getting hurt or anything?

Q As far as anything.

A Well, it's like I told you earlier, if you're up on a barge and there's mud on it, if you don't have your feet planted solid you can get pulled overboard –

Q Okay.

A – from it because there's so much weight. You have to pull away from the weight to keep from losing the cable. If you slip you either have to let the cable go or it's going to pull you in. It is dangerous if you have mud on a barge.

Q Okay. So that danger is slipping and either having to drop the cable or being pulled into the river?

A Yeah.

Q Okay. Any other types of dangers that you noticed while you were working on the Curly B?

* * *

[44] I'm sorry, but when you started working full time did you receive any training – when you began working full time as a deckhand did you receive any other training or formalized training by anyone at Lake Michigan Contractors?

A As being a deckhand?

Q Right.

A No, sir.

Q Were you ever given any pamphlets or anything like that on safety procedures to read or any literature of any sort to read?

A As to being a deckhand?

Q Yeah.

A No, sir.

Q At any time in being a Lake Michigan Contractors employee were you ever given any material to read?

A When I was first hired they give you a paper about the drug deal and stuff like that. That's the only thing I can recall that I was gave to read.

Q Okay. I'm going to show you what we've already had marked as Deposition Exhibit #1.

A Yeah, I remember that.

Q After you've had a chance to look at that would

* * *

[51] nothing to show. You just grab it. You're just standing there, you grab it, and throw it up on the mold.

Q Any other jobs or any other experience that you had where you were trained in how to lift equipment or objects or anything of that nature?

A There's no job I ever worked that actually showed me how to pick things up.

Q Okay.

A Automatically I know to use my knees. I mean that's common sense.

Q And when you say "use your knees," can you be –

A Bend at the knees to pick up. In some cases you can't bend at the knees. Like on the boats when you're handling cables on the side you cannot bend.

Q Okay. And describe again why it is that you can't bend on the boats.

A Because you would hit your knees on the side. You got the side of the boat here (indicating), and you got to reach over the side to get a cable. How are you going to bend? You're going to bump your knees.

Q Okay. On the barge there's no sides, right?

A On the barge itself?

* * *

[57] Q Okay. In this photo you can actually see the bit?

A Yeah. This is the bit right here, it looks like (indicating).

Q Can you put a circle around that.

A Looks like it right here (indicating).

Q Okay. And does that bit go below where we can see in this photograph? In other words below and behind the wall?

A Yeah, it's down here (indicating).

Q All right. And where exactly do you stand when you are either –

A Taking these off?

Q Facing the tug.

A Right here (indicating). This is – there's a bit right here (indicating). See it?

Q Yes.

A You have to stand here to take these cables off to hand them to the other deckhand (indicating).

Q Okay.

A And this cable also, like I said, runs down. There's tires there. Sometimes this cable gets stuck under the tires and you actually have to lean over the side to get it unstuck.

Q Okay.

* * *

[61] water, they get rusty.

Q Okay. Did you ever hear anyone complaining about the condition of the cables?

A There's been times they say we're going to have to change them because they were looking bad and frayed. What I mean by "frayed" is they're steel and you have spots that break loose that come out in your hand and it cuts your hand.

Q Okay. Did you ever hear anyone on the crew of the Shirley Joy complaining about anything else having to do with the cables aside from the fraying?

A Just, like I said, they said their back was sore from lifting them.

Q And did those complaints have anything to do with the physical qualities of the cable themselves?

A The cables are heavy. There's no doubt about it. I mean you take steel, compare it to kevlar, a 100 percent difference.

Q Would the amount of cable that you had to handle in working as a deckhand at any given time be more than 25 pounds?

A Oh, yeah. Definitely.

Q Can you give me a rough estimate of what the

* * *

[95] belt. I don't recall any belts being on the boat. Because that would fall under safety procedure.

Q Okay. Anything else? Anything else about the boats or anything else?

A Not that I can recall.

Q Is there anything else in the document that you think is inaccurate?

A No.

Q No?

A No.

Q You said that after you blacked out that Mark came over and assisted you?

A Yeah. He had to walk from the head of the barge back to me to get on the boat.

Q And did you say anything to him at that point?

A I told him that my back was hurting bad.

Q Okay.

A And that I was going to go down. My legs were giving out on me.

Q Do you recall any other conversation with him?

A I just – see if he could help me back. I don't remember everything that happened. Like I said, I was in severe pain.

Q Did Silver then come over to the dredge?

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

-vs- Case No. 1:98-CV-769

LAKE MICHIGAN
CONTRACTORS, INC.,

Defendant.

Telephone deposition of MARK DAVID CLAPSADLE, taken pursuant to Notice, at 141 Pin Oak Drive, Williamsville, New York, on July 8, 1999, commencing at 11:20 a.m., before ADRIANNE HUNT, C.P. , Notary Public.

* * *

[17] whether or not you were actually on the Curly B?

A. I don't think I was ever on that one, no. But I remember – they did use it there when I was in Cleveland, but all of my time was on the Shirley Joy.

Q. All right. When you joined the Shirley Joy in, I think you said, August '97?

A. Correct.

Q. Was Mr. Rutherford already on board?

A. Yes he was. He was there whenever I got there.

Q. Had that been the first time you met Mr. Rutherford?

A. Yes.

Q. And he was also a deck hand?

A. Yes.

Q. Any other deck hands aboard the Shirley Joy?

A. At the time I arrived, yes, there was. There was another guy by the name of Steve Byrum.

Q. B-Y-R-U-M. I believe.

A. M or N. I'm not sure.

Q. Do you recall a deck hand by the name of Patrick Smith?

A. I don't believe I've ever met a Patrick Smith.

Q. Was there ever a fourth deck hand on the Shirley [18] Joy?

A. Not in the time that I was on it.

Q. How long exactly were you on the Shirley Joy? In 1997 you joined it in August?

A. Yes. That's correct.

Q. For the rest of the season?

A. I finished out the season before the season was over. They were about to shut down in Detroit, we were doing the Rouge River there in Detroit. Dearborn.

Q. Okay. And did you sail aboard the Shirley the following season?

A. No.

Q. Okay. What did you – you indicated you were with Lake Michigan for two years?

A. No, I was only with them for the one year.

Q. Oh, just one year, I thought you said two. Just that one season, then?

A. That's it.

Q. All right. So yourself, Mr. Rutherford and Steve Byrum were the three deck hands?

A. That's correct.

Q. Do you know whether or not the tug ship carried a [19] crew of four deck hands?

A. Not to my knowledge. Not any time that I was on the vessel.

Q. All right. Do you know how long Mr. Rutherford had been aboard the Shirley Joy prior to your joining the ship?

A. From what I understood, he wasn't on there much longer than myself. He was only there a week or maybe two weeks before I got there.

Q. Do you know anything about Mr. Rutherford's maritime background, or how long he'd been sailing?

A. No I don't.

Q. And how did the deck hands work? Were they day shifts? Split shifts? What were your hours?

A. We would work six-hour shifts with two of the deck hands. Third deck hand would be more or less as we call a flopper. That deck hand would be more or less off duty. Except for just when we were mating or un-mating. Taking out a full or bringing in an empty to the dredging rig.

Q. Okay. So two are working six-hour shifts and the third one is technically off?

A. The only time he was needed was when – he was [20] used only when he was needed.

Q. Okay. So was he considered a day worker, then?

A. I really couldn't say how – you know, say how you could put that.

Q. Well, would he be sleeping while the other two deck hands were –

A. One deck hand would be on duty. The flopper, he had his time to – whatever he wanted to do. Sleep, eat,

shower, you know, take care of whatever he wanted to do. But he would only be used in the time that it took to swap out the empty with the full barge. While we went out, dumped the full, came back in to sit on the wall, then he would go back off duty.

Q. So did the flopper participate in handling the lines?

A. That's correct.

Q. Of the three of you when you joined the Shirley Joy, who was the flopper?

A. I'm not so sure right at the exact time when I went on, but we would – we would switch off and we would work, I'm not sure whether we'd go for a week there, and then we would swap out to somebody else would go to flop, so that two guys weren't doing their [21] six-hour shifts all the time and somebody else not having to.

Q. Okay. but for the most part there were three people participating when it came to loading or, I'm sorry, facing the wires between the tug and the barge?

A. No. When you would face up, there would only be two.

Q. Okay. I guess that's where I wasn't clear.

A. One of the guys that had his six-hour shifts, only one of them guys is on his shift. The other guy has his six hours off.

Q. Okay. I thought it was the flopper that worked opposite the other two guys?

A. No, the flopper works with both guys.

Q. All right.

A. Only – only when he's needed.

Q. Okay. Who – did you, as a deck hand, could you make the decision to call him up, get him up out of bed, you know, call him up on deck if you thought you needed help?

A. That's correct. We would already been mated to the empty because we went out and dumped it. We came back with it empty after we dumped on the lake. We

* * *

[29] A. Your cable coming off of the tug is more or less a double cable. It's a hoop. You're coming off of the winch, out doing a hoop around the bit on the barge, then the cable comes back, and the end of that is hooked into the side of the tug, farther back from the winches.

Q. Okay.

A. So you're coming off the side of the tug, out around the bit, and then back into the winch.

Q. So the hemp line is what's hooked to that hoop?

A. It's more or less on a slide clevis. So that it does slide on the cable.

Q. But where is the hoop of the cable when that rope is not being used?

A. The hoop of the cable if that cable is not being used, that cable is brought up and hooked right on the bit that's right on the bow of the boat.

Q. Okay. And the hemp line is then located where?

A. That would just be hanging inside right on the front deck.

Q. Now, is the – is any of the cables stored over the side of the tug at all.

A. All of the cable is stored. You don't bring the [30] cable on. The cable is more or less hung over the edge of the bow. And brought up to where just the hoop of the cable is around the bit on the front of the tug.

Q. Okay. So I take it when you're lifting this hemp rope that's attached to this hoop at end of this cable, right?

A. You would unhook the – the hoop that's on the bit on the front of the tug, you would unhook that by holding the cable. Once you have it unhooked off the bit, you would grab hold of the hemp rope and lower the hoop of the cable down, holding onto the hemp rope.

Q. Okay. And then it's the person on the barge that takes the hemp rope?

A. Correct.

Q. And pulls the slack of the cable out towards them?

A. Correct.

Q. Okay. Now, is that – I guess I need you to explain is how – is that pulling from the winch?

In other words, if it's looped over the side of the tug, and all this guy on the barge has is the hemp

* * *

[55] A. I don't recall if I had to sign anything there on that, but he did have me read it, and then I'm not sure if that was just something, an accident report or exactly what it was. I don't remember that.

Q. Okay. Do you know whether Lake Michigan had a safety program?

A. I'm really not sure on that.

Q. Did you ever – were you required to attend safety meetings?

A. Not to – not to my knowledge, no.

Q. Were you provided any safety booklets?

A. I'm – nothing that we were each issued. Thinking back, like I say, it's been a couple years, whether there was one there on the tug – like I say, I can't say for positive.

Q. How about safety equipment such as black belts?

A. Nobody, while I was on the rig, was issued anything there.

Now from what I understood, I think there was a – there was a back support or a – some kind of a lifting belt or something, I was told there was one there somewhere. But myself, I never used one, you know?

* * *

[58] snap, as well?

A. Yes, I have.

Q. What causes those cables, in your experience, to give like that?

A. Well, it all depends. It could be weather. You know, if it gets rough, you got to back off, you got to unhook. If you're in push, if you see the weather is gonna be bad you won't even hook up to push, you go right to a long tow line and you tow that barge rather than try to push it.

If you have your push lines out to where you make a turn and then you try to correct yourself too quickly and put too much stress on that side, you can snap that steel. In fact, like I say, when we were in Dearborn, we lost two of those steel cables.

Q. You lost two steel cables while you were pushing?

A. That was one – yeah, we had two loaded barges hooked on the front, one in front of each other, which had too much leverage on them cables.

Q. So it's fair to say that it has to do with the maneuver of the vessels and the weather –

A. Correct.

Q. – both types of lines are susceptible to

* * *

[72] have that barge sitting against the dredge. Now, you might have that barge overhanging the end of their dredging rig, that line would be longer out to that point,

compared to the one on the other end, which would be run back the other way.

Q. Okay. But are the lines necessarily always going perpendicular, then, between those two vessels?

A. Pretty much, yes. You're – well, you would – like I say, if you're overhanging with the barge, you've got that longer line from the corner of the dredging rig out to the corner of that barge. You got a longer cable there than you do on the other end you would be going back the other way.

Q. Now, you mentioned gravity and weight of the cable hoop that runs from the tug to the barge?

A. Yes.

Q. Can you quantify that weight for us? How much that weighs?

A. Oh, total weight on that cable, you know, if you were to cut the hunk of cable off and weigh it, I would have to – I would estimate, I, don't know, 120, 150 pounds.

Q. And you used – is it necessary to use two hands [73] when you're lifting that hoop?

A. More or less, you always use two hands.

Q. Is it pulling you with it?

A. Well, it all depends there on, like I say, how you're set there. As long as you're ready for it – if you're – if you're off balance or you're not – if you're not ready for it, or even to hit something slick, that, you know, if you hit a wet spot or it may be a muddy spot there on the

barge, there's times where you have to just let it go, let it go right to the water.

Q. But your expectation is that you've got to brace yourself when you're lifting cable, versus the Kevlar line, correct?

A. Correct. Just the weight difference there.

Q. And that's why the guys preferred the Kevlar?

A. Yeah. It was just easier to handle.

Q. Do you know who the supplier of that Kevlar line was?

A. No, I don't. I don't really know nothing on where they get any of their supplies or anything like that.

Q. Do you know if there are other – if there are [74] different types of Kevlar lines?

A. Yes, there are. There are – the Kevlar brand, which is probably the best. Now this is just from what I understand. Like I say, I haven't never really bought any or really dealt with it other than those.

But from what the other guys were saying that have used them, that them didn't seem like they were, I would say, as good a brand, or what it was there, you know? I'm not – like I say, I really – really can't say there.

Q. Do you know, Would it be Mr. Moon or somebody land-based that controls the purchasing equipment for the vessel?

A. Yes, it would be.

Q. So you can't say as we speak here whether there was something wrong with that particular Kevlar line

that resulted in its breaking twice within that close period of time?

A. No, I couldn't.

Q. And you don't know that that wasn't the problem either, do you, sir?

A. No. Like I say, I really haven't dealt with that Kevlar except for on the Shirley Joy at that time.

* * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR., Plaintiff,	)	
vs.	)	Case No. 98CV769
LAKE MICHIGAN CONTRACTORS, INC., Defendant.	)	Judge Miles

Transcript of deposition of WAYNE MOON, Agent of Defendant herein, called by the Plaintiff as upon cross-examination, pursuant to Notice and Court Order, pursuant to the Federal Rules of Civil Procedure, before Denise C. Winter, a Registered Merit Reporter and Notary Public within and for the State of Ohio on Thursday,

September 2, 1999, at the offices of Merit Reporting Services, 2000 East Ninth Street, Suite 310, Cleveland, Ohio, commencing at 10:00 a.m. and concluding at 11:15 a.m.

* * *

[21] directed to do this was because it was thought to be stronger?

A. Yep.

Q. Is the fact that it was thought to be lighter also a factor?

A. I don't know.

Q. So stronger was the only thing you were to look into?

A. No. I was instructed to look into pricing. I was instructed to look into its breaking strength, resistance to heat abrasion and breaking strength, heat resistance and abrasion resistance and to find out which type of synthetic material would be best suited for our needs.

Q. Were you having problems with the steel cable breaking?

A. They all do at some point through either wear or misuse by personnel.

Q. Do you know what triggered Joe Walsh to tell you to look into this synthetic line?

A. We had a good season and he thought he probably could afford it.

Q. Let me go back to a question I asked you a little bit ago. Is the plasma line with the chafing materials that you have described lighter than the steel cable?

A. Slightly or somewhat.

Q. Did weight ever come into the equation with regard to [22] using the plasma line as opposed to the steel cable?

A. No.

Q. So it was primarily strength?

A. I believe so.

Q. Because it was more expensive; is that correct?

A. Significantly.

Q. You had to add stuff to it for abrasion purposes; is that correct?

A. Uh-huh. The cables chew up those bollards pretty good.

Q. Was the chafing material expensive, also?

A. The partek cost more than scrap fire hose, I'll say that, but not –

Q. When you say "fire hose" –

A. Canvass. Rubber hose with canvass covering.

Q. And you would buy scrap fire hose for that purpose?

A. No. We would have it on the boat. Stuff that had leaks in it, we would cut it up and use that.

Q. So the – let me ask you this: How many times do you recall ordering the plasma line for the Shirley Joy?

A. One time.

Q. Do you know what was used as chafing material for that?

A. The partek.

Q. For the plasma line that was used on the Shirley Joy?

* * *

[41] breaks, the reaction of the plasma line?

MR. CARLEY: I'm going to object to the foundation. You can answer that.

A. Okay. Repeat that, please.

Q. As you understood it, was there a concern in your mind about what happens with the plasma line when it breaks?

A. Yeah.

MR. CARLEY: Same objection.

A. Yeah. It shoots back in a straight line to its point of origin. Steel cable will drop. It doesn't have a big whip action because it's firmer and stiffer.

Q. And that snapping back in your mind, as the person who orders that line, created a safety concern with respect to the deck hands?

A. Yes. I can tell you that I know people personally who have been hit with lines that broke when I worked with Great Lakes Dredge who had their legs broken or arms broken.

Q. And was that a reason that you took into consideration –

A. Primary reason.

Q. – in discontinuing the use?

A. Primary reason. I was worried somebody would be in the line of fire when it let go and get nailed.

MR. CULLINAN: That's all I have.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

PLAINTIFF'S MOTION FOR LEAVE TO FILE SURRESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Dec. 27, 1999)

NOW COMES the Plaintiff, by and through his attorneys, the Jaques Admiralty Law Firm, and hereby moves this Honorable Court for leave to file a surresponse to Defendant's Motion for Summary Judgment, pursuant to Rule 7.2(c) of the local rules of this Court and Rule 15(d) of the Federal Rules of Civil Procedure, for the reason that Defendant's reply contains additional arguments and inaccuracies, which are addressed by Plaintiff in his proposed surresponse, attached hereto.

WHEREFORE, Plaintiff requests that this Honorable Court issue an order granting Plaintiff leave to file a surresponse to Defendant's reply, in the form attached hereto.

Respectfully submitted,

THE JAQUES ADMIRALTY
LAW FIRM

By: /s/ J. Kelly Carley
J. KELLY CARLEY
(P-38892)
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

Dated: December 22, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE SURRESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In support of his Motion for leave to file a surresponse to Defendant's Motion for Summary Judgment, Plaintiff replies on local rule 7.2(c) of the local rules of the United States District Court, Western District of Michigan, and upon Federal Rule of Civil Procedure 15(d) which mandates that leave to amend pleadings or motions be freely given when justice so requires. *Novak v. National Broadcasting Co., Inc.*, 724 F.Supp. 141 (S.D.N.Y. 1989).

Respectfully submitted,

THE JAQUES ADMIRALTY
LAW FIRM

By: /s/ J. Kelly Carley
J. KELLY CARLEY
(P-38892)
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

Dated: December 22, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

SURRESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The instant rebuttal brief is intended to clarify a couple of points set forth in Defendant's Reply Memorandum. It is not intended to re-argue those points set forth in Plaintiff's original response to Defendant's Motion for Summary Judgment.

On Page 1 of the Defendant's Reply Memorandum, Defendant states that Plaintiff has mislead the Court as to his burden to defeat a motion for summary judgment. Plaintiff has characterized that burden as light (see Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 5). The Defendant contends that the duty of care in a Jones Act case is one of ordinary care, which is technically correct (see Defendant's Reply Memorandum, p. 1). The flaw in Defendant's reasoning is in confusing Plaintiff's burden of proof at trial with that which is required to defeat a motion for summary judgment.

It is well accepted that the burden on the non-moving party is not a heavy one; the non-moving party simply is required to show facts, as opposed to general allegations, that present issues worthy of trial. *Wright, Miller & Kane,* Federal Practice and Procedure; Civil 3, §2727, p. 490. Further, as the Court is well aware, before granting summary judgment, it must be clear that there is no genuine issue of material fact. *Bonney v. Upjohn Co.,* 47 F.Supp. 486, 491 (D.C. Mich. 1980). Because the burden of proof is on the movant, the evidence presented to the court must always be construed in favor of the party opposing dismissal. *Id.,* at 191. Further, all references to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *Id.,* at 491.

In an admiralty case, this light burden to defeat a motion for summary judgment must be read in conjunction with the plaintiff's featherweight burden regarding causation. Defendant does not dispute that Plaintiff's burden is slight to establish causation. *Evans v. United Arab Shipping Co. (SAG),* 790 F.Supp. 516, 519 (D.N.J. 1992), aff'd. 4 F.3d 207 (3rd Cir. 1993), cert. denied, 510 U.S. 1116 (1994).

In addition to Plaintiff's Jones Act negligence claim, allegations of unseaworthiness have also been pled against the Defendant. The seminal case enunciating the doctrine of unseaworthiness, as we know it today, is The *Osceola,* 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 769 (1903). In The *Osceola,* the Supreme Court ruled that a shipowner could be held strictly liable for injuries to seamen who are injured as a result of a ship's unseaworthiness. The

Supreme Court further clarified the doctrine in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The *Sieracki* Court stated:

> It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the services imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy. 328 U.S. at 94-95, 66 S.Ct. at 877.

The Supreme Court also has noted the shipowner's duty to furnish a seaworthy vessel is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 80 S.Ct. 926, 933, 4 L.Ed. 941 (1960).

The unseaworthiness doctrine has been extended to accidents which occur due to an ill trained or undermanned crew. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 730, 87 S.Ct. 1410 (1967). The Supreme Court in *Waldron* reversed the lower court's granting of summary judgment and ruled that whether the assignment of two men to do the work of three or four in hauling heavy manilla mooring line along the deck of a vessel during docking operations was a question for the jury in the seaman's action against the shipowner for injuries sustained when fell and injured his back. The Supreme Court noted that the basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness. The Supreme Court found that there was. 386 U.S. at 736, 87 S.Ct. at 1411.

Unseaworthiness has also been found where a seaman is forced to use a dangerous or unsafe method of operating otherwise seaworthy equipment. *Luneau v. Penrod Drilling Co.*, 720 F.2d 675 (5th Cir. 1983).

It goes without saying that in any traditional land based case, the burden on the party responding to a motion for summary judgment is light. As the above law demonstrates, the proofs required by a plaintiff in an admiralty case are less than those required of a land based plaintiff. This fact lessens the already light burden on an admiralty plaintiff to defeat a motion for summary judgment. Therefore, it is not inaccurate to define the burden on an admiralty plaintiff in responding to a motion for summary judgment as slight.

The Defendant would love to narrow this case to one strictly about a seaman lifting a heavy object. At Page 3 of its Reply Memorandum, the Defendant cites a number of cases for the proposition that a vessel owner cannot be held liable for requiring a seaman to move or lift a heavy or awkward object. However, the allegations in this case, as well as the factual presentation, are not at all similar to those cases cited by the Defendant. Moreover, as was shown in Plaintiff's original Response to Defendant's Motion for Summary Judgment, and as will be highlighted below, there if [sic] far more to this case than an injury resulting from the seaman required to lift a heavy or awkward object.

Starting at Page 3 of its Reply Memorandum, the Defendant makes the conclusory statements that Plaintiff has not produced any evidence showing that the cables in question were defective nor that Plaintiff was required to

handle the cables in a manner that was not reasonably safe. First Plaintiff is under no obligation to show that the steel cable was defective. If used for the right application, a steel cable would be acceptable. However, Plaintiff will show that the use of the steel cable as required by the Defendant in this case was a misapplication and directly led to Plaintiff's injuries.

The Defendant also points out that the Plaintiff has set forth no expert testimony supporting his allegations. The Defendant makes this statement without explaining why such expert testimony would be necessary. It is believed this lack of explanation is due to the fact that such testimony is indeed not warranted in light of the basic and straightforward nature of Defendant's negligence and breach of duty under the Doctrine of Unseaworthiness. As was demonstrated in Plaintiff's original Response to Defendant's Motion for Summary Judgment, and as will again be reiterated briefly below, the issues will be easily understandable to a lay jury.

The Defendant, on Page 4 of its Reply Memorandum, states: "First, the uncontroverted evidence in the case reveals a synthetic line was not safer to use than a steel cable." This statement makes clear that Defendant's defense is now that the synthetic cables were dangerous, therefore, the steel cables had to be used. Even a cursory reading of the testimony in this matter, along with the accident report, belies the *ex post facto* nature of the Defendant's defense.

Mark Clapsadle, the other deckhand working with Mr. Rutherford at the time of the accident, has testified as follows:

Q Now, you know who makes the decision as to what type of line should be used, cable vs. kevlar (synthetic)?

A No, I don't.

Q Do you know why they changed back from the steel to the kevlar?

A More or less to make things easier for the deck hands. It's a lot lighter, a lot easier to handle.

Q What is that kevlar line made out of, do you know?

A It's a braided, it almost looks like a heavy-duty nylon, but it's a different type of material that's supposed to be a lot stronger.

(See Exhibit 1, Clapsadle dep., p. 34)

The Plaintiff, Gene Rutherford, has testified as follows:

Q Can you tell me how kevlar lines are different from the cables that you described that you were using on the Curly B?

A A whole lot lighter. I mean you can lift it with one hand.

Q When you say "it." You're talking about the four feet or so that you normally have to hold?

A Yeah.

Q With the eye of the line?

A Yeah.

Q So it sounds like those lines were no more than, how much weight?

A I just – just hardly any weight at all there.

Q The steel cable, could you hold it with one hand?

A No. You'd have to hold it with two hands because – if you're on a muddy barge and you have to have one hand on the cable you take a chance getting pulled into the lake or the river or whatever. I mean there's a lot of weight there.
(Exhibit 2, Rutherford dep., p. 31, 32)

All who have testified in this matter have clearly indicated that steel cable breaks with as great of regularity as synthetic line. Mr. Clapsadle testified:

Q Okay. Have you had occasion to see steel cable snap, as well?

A Yes, I have.

Q What causes those cable, in your experience, to give like that?

A Well, it all depends. It could be weather. You know, if it gets rough, you got to back off, you got to unhook. If you're in push, if you see the weather is going to be bad you won't even hook up to push, you go right to a long tow line and you tow that barge rather than try to push it.

If you have your push lines out to where you make a turn and then you try to correct yourself too quickly and put too much stress on that side, you can snap that steel. In fact, like I say, when we were in Dearborn, we lost two of those steel cables.

Q You lost two steel cables while you were pushing?

A That was one – yeah, we had two loaded barges hooked on the front, one in front of each other, which had too much leverage on them cables.

Q So its fair to say that it has to do with the maneuver of the vessels and the weather –

A Correct.

Q Both types of lines are susceptible to breakage though?

A Correct.

Q Is that a fair statement?

A Correct.
(See Exhibit 3, Clapsadle dep., p. 57-59)

Mr. Rutherford testified:

Q Would you agree then that the use of lines that were breaking [synthetic] were somewhat dangerous?

A No, sir.

Q Why not?

A Because they've used them before and had no problem out of them.

Q Okay. But how about if they started breaking?

A Well, in my opinion, it's no different than the steel cable because the steel cable can fray and it break, too. And its more dangerous if it breaks.

Q In your experience, are the steel cables stronger than the kevlar cables?

A I hear they're about the same.
(See Exhibit 4, Rutherford dep., p. 35).

Mr. Rutherford went on to testify.

Q Okay. Any other types of danger you notice while You were working on the Curly B?

A The only danger – other danger that could happen is if one of those steel, cables broke and you happen to be on deck and it snapped, it would come back and it would cut you in two. It will kill you.

Q Okay. And that particular danger would be present it's steel cable or kevlar cable?

A Kevlar does not whip back like steel cable.

Q Have you ever seen a steel cable break before?

A I've heard them snap. I've never actually seen them break.

Q Now are you aware that the steel cable is snapped back differently than a kevlar cable would?

A Am I aware of that?

Q Are you aware of that?

A Yeah. I've heard some stories about it yes.

Q Have you ever observed the difference yourself?

A No. I've seen kevlar break.
(Exhibit 5, Rutherford dep., p. 41-42).

The Defendant's own representative, Wayne Moon, testified as follows:

Q Do you know, since you have been here, have you ever heard of facing line, steel cable, breaking?

A Oh, yes.

Q Does that occur often?

A Their life span varies from one day to four months depending on sea conditions. We have

had brand new ones go the day you put them on.
(See Exhibit 6, Moon dep., p. 39)

In addition to the above testimony, the accident report in this case indicates that it was not the Defendant's belief, at least on the date of the accident, that the steel cable was safer than synthetic line. To the contrary, Mr. Moon, the manager of the company's Ohio division, and the individual who filled out the accident report, indicates the contrary. By way of background, the accident report was filled out the same date as the accident, August 20, 1997. In the accident report, Mr. Moon clearly set forth both the cause of the accident and that action which would be taken to prevent reoccurrence. The form accident report has the following printed questions on it:

What caused the accident?

Mr. Moon answered, **"Weight of cable and unfamiliarity of cable pulling techniques."**

What action has been or will be taken to prevent re-occurrence?

Mr. Moon wrote, "**Synthetic lines that are stronger yet lighter weight will be reinstalled.**"
(See Exhibit 7, Accident Report)

Further, the Defendant's current defense also ignores Mr. Moon's testimony wherein he explains that he did an extensive viability study comparing synthetic lines to steel cable prior to purchasing the synthetic lines. Mr. Moon testified that the synthetic lines were chosen because of their breaking strength, resistance to heat and abrasion (see Exhibit 8, Moon dep., p. 21). He confirmed

the decision was made primarily on the strength factor (see Exhibit 9, Moon dep., p. 22).

Additionally, testimony has demonstrated that the physical configuration of the wall at the bow of the tug made it virtually impossible for the deckhand on the tug to protect his back when lowering the cable to the deck hand on the barge. More specifically, a wall around the front of the tug precluded the deck hand on the tug from bending his knees when lowering the cable. This limitation begs for injury in light of the fact that the cable hoop which is being lowered weighs between 120 and 150 pounds.

With regard to this limitation, Mr. Rutherford has testified as follows:

> Q And typically when grabbing the cables were they – was there any particular portion of the cable the deck hand was handling?
>
> A It would be hung on the bow of the boat that would hang over the side. He would have to grab it. In other words, you're standing – you couldn't bend at the knees because you would bump your knee on the side of the boat. There is no way of bending at the knees. Basically it depends on how far they were draped over. You'd have to bend over, pick them up, hand them up to the deck hand or down to him, whichever job you were doing, a full barge or an empty barge.
>
> (See Exhibit 10, Rutherford dep., p. 16)
>
> * * * *
>
> Q Are you able to bend or use your knees to attach or disconnect the cable from the front of the boat?

A I don't see how. There's no way. I mean you're standing there. You see this wall here (indicating)? If it's here, there's no way you can bend.

Q Well, going back again, is that ever being disconnected either?

A Yes. These – this cable is continuous, I'll say. The shock is here (indicating). The cable is connected to the shock. It runs like this (indicating). And this runs back this way (indicating). There is a spot in the side of the boat here, it runs through into the winch, which causes it to go in and out.

Q Okay.

A Now when you take these off if this cable is stuck under the tire you have to bend over to get it out from under the tire. You cannot bend at the knees because you're against the wall already. It would be like this leaning over (indicating).

(Exhibit 11, Rutherford dep., p. 59)

The Defendant attempts to rebut this testimony by stating on Page 6 in its Reply Memorandum: "Passing the cable to Clapsadle did not require the Plaintiff to bend or lean over." This statement is conclusory and unsupported by the record. The Defendant then goes on to state that Mr. Clapsadle testified that a hemp rope was utilized for leverage, so that the Plaintiff did not have to lean over while lowering the cable. Defendant cites pages 28 and 65 from Mr. Clapsadle's deposition for this proposition. However, even a cursory reading of those deposition pages indicate that Mr. Clapsadle's testimony has been misrepresented. While a hemp rope is utilized, it makes no difference if one is picking up 120-150 pounds of steel cable by itself or lifting it with a rope, one is still lifting

the same weight. The same would be true when lowering the cable to the deckhand on the barge, below.

There is also evidence in this matter that the deck hands were not given or required to wear weight belts when lifting the cable. Mr. Moon has testified that the Defendant does supply weight belts for use by the deck hands (see Exhibit 12, Moon dep., p. 34). However, defense counsel would not allow Mr. Moon to answer any further questions regarding the weight belts.

Mr. Clapsadle testified as follows regarding the weight belts.

Q How about safety equipment such as back belts?

A Nobody, while I was on the rig, was issued anything there.

> Now, from what I understood, I think there was a – there was a back support or a – some kind of lifting belt or something. I was told there was one there somewhere. But myself I never used one, you know.
>
> (See Exhibit 13, Clapsadle dep., p. 55).

Mr. Rutherford does not remember there being any weight belts at all. He testified:

> Q Do you have an opinion as to whether there was anything else about the equipment that caused your injury other than the fact they weren't using the kevlar lines?
>
> A I didn't have – I think it was mentioned in here somewhere about a belt, to wear a belt. I don't recall any belts being on the boat. Because that would fall under safety procedure.

(See Exhibit 14, Rutherford dep., p. 94-95)

As Mr. Moon noted in the accident report, it was the Defendant's belief that one of the causes for Mr. Rutherford's accident was his lack of knowledge regarding cable pulling techniques. Mr. Clapsadle has testified that he is not sure the Defendant had the safety program and does not believe he was required to attend any safety meetings (see Exhibit 15, Clapsadle dep., p. 55). Mr. Rutherford has testified that he had no specific training from the Defendant but, on an earlier barge, was shown what to do by another deck hand (see Exhibit 16, Rutherford dep., p. 12). However, that deck-hand *did not teach him how to physically remove cables* (see Exhibit 17, Rutherford dep., p. 16).

CONCLUSION

The above clearly sets forth numerous questions of fact with regard to both Plaintiff's claims of negligence and unseaworthiness. As such, Defendant's Motion for Summary Judgment should be denied.

Respectfully submitted,

THE JAQUES ADMIRALTY
LAW FIRM

By: /s/ J. Kelly Carley
J. KELLY CARLEY (P-38892)
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(313) 961-1080

Dated: 12-22-99

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

CERTIFICATE OF SERVICE

The undersigned, being duly sworn, deposes and says that on the 22nd day of December, 1999, she served **Plaintiff's Motion for Leave to File Surresponse to Defendant's Motion for Summary Judgment, Brief in Support of Plaintiff's Motion for Leave to File Surresponse to Defendant's Motion for Summary Judgment** and **Certificate of Service** along with proposed **Order** in the above matter to the following Defendants via regular U.S. Mail:

John A. O'Donnell, Esq.
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/s/ Patricia A. Shumake
Patricia Shumake

Subscribed and sworn to before me
this 22nd day of December, 1999.

/s/ Sherri S. Rivard
SHERRI S. RIVARD
Notary Public, Wayne County, MI
My Commission Expires Sept. 30, 2002

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:98-CV-769

GENE A. RUTHERFORD, JR.,
Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,
Defendant.

Clapsadle – Schornack-Smith – 07/08/99

* * *

[34] then replaced them with the cables just before I came on.

Q. Okay. But then did they switch from cable to Kevlar?

A. They did bring in a new set of the Kevlar lines, brand new set that we had put on, and wore them out and then went back to cable.

Q. Now, do you know who makes the decision as to what type of line should be used, cable versus Kevlar?

A. No, I don't.

Q. You know why they changed back from the steel to the Kevlar?

A. More or less to make things easier for the deck hands. It's a lot lighter, a lot easier to handle.

Q. What is that Kevlar line made out of, do you know?

A. It's a braided, it almost looks like a heavy-duty nylon, but it's a different ~~but~~ type of material that's supposed to be a lot stronger.

Q. How thick in diameter is it, if you know?

A. I would say approximately one-inch, one and an eighth inch.

Q. But that's something that they have used for

* * *

EXHIBIT 2

[31] kevlar lines.

Q. Kevlar lines?

A. Kevlar, yeah.

Q. K-e-v-l-a-r, I think that is. Can you describe what those are?

A. It's like rope. It's lightweight.

Q. Can you tell me how kevlar lines are different from the cables that you described that you were using on the Curly B?

A. A whole lot lighter. I mean you can lift it with one hand.

Q. When you say "it," you're talking about the four feet or so that you normally have to hold?

A. Yeah.

Q. With the eye of the line?

A. Yeah.

Q. So it sounds like those lines were no more than how much weight?

A. I just – just hardly any weight at all there.

Q. The steel cable, could you hold it with one hand?

A. No. You'd have to hold on with two hands because – if you're on a muddy barge and you have to have one hand on the cable you take a chance of getting pulled into the lake or the [32] river or whatever. I mean there's a lot of weight there.

Q. And did you use the kevlar lines the whole time that you were out there on the Rochester project?

A. Not the whole time, because we had to go to steel cables because the kevlar lines broke.

Q. Can you tell me what period of time during those three weeks you used kevlar lines versus steel cable?

A. Most of the time I was up there we had kevlar. I don't remember exactly when we changed to the steel ones.

Q. Had you ever observed the kevlar lines breaking?

A. Yes.

Q. Can you tell me how many times when you were on that project the kevlar lines broke?

A. Two.

Q. Where did they break?

A. I guess you would call it right at the shock. What I mean by the shock is where it's coming off of the tug on the side. It's like a shock absorber, they call it, but it's bigger rope.

Q. And both instances it broke about the same place?

EXHIBIT 3

* * *

[57] Captain decided we'd go with the one-inch steel wire?

A. Well, what it was, we kept breaking that Kevlar. We snapped it off, we would put a new eye on the end of

it to where that would totally change where you're wearing, because of the length you're cutting it shorter, and then we snapped it again there, you know.

That was something with the – sometimes that weather would kick up when you're pushing, sometimes you couldn't even push, we had to go to a tow, to tow the loaded one out to dump. You can only take so much rock and roll with the tug tied to the barge.

Q. Okay. And it was snapping off, where did you describe it?

A. Right where it goes around the bit, we would just wear it.

Q. Okay.

A. Even with those, we tried to run pieces of fire hose, you know, pieces of rubber hose, anything that we could put over that to stop it from chafing.

Q. From rubbing?

A. Yeah, rubbing it raw there, yeah.

Q. Okay. Have you had occasion to see steel cable [58] snap, as well?

A. Yes, I have.

Q. What causes those cables, in your experience, to give like that?

A. Well, it all depends. It could be weather. You know, if it gets rough, you got to back off, you got to unhook. If you're in push, if you see the weather is gonna be bad you won't even hook up to push, you go right to a

long tow line and you tow that barge rather than try to push it.

If you have your push lines out to where you make a turn and then you try to correct yourself too quickly and put too much stress on that side, you can snap that steel. In fact, like I say, when we were in Dearborn, we lost two of those steel cables.

Q. You lost two steel cables while you were pushing?

A. That was one – yeah, we had two loaded barges hooked on the front, one in front of each other, which had too much leverage on them cables.

Q. So it's fair to say that it has to do with the maneuver of the vessels and the weather –

A. Correct.

Q. – both types of lines are susceptible to [59] breakage, though?

A. Correct.

Q. Is that a fair statement?

A. Correct.

Q. Other than Mr. Platt and Mr. Moon, is there anybody else that you might have had any conversations with regarding Mr. Rutherford's injury?

A. No. Not that I recall.

MS. SHORNACK-SMITH: That's all I have right now, Mr. Clapsadle. I'll defer to Mr. Cullinan.

EXAMINATION BY MR. CULLINAN:

Q. Thank you.

Mr. Clapsadle, this is Patrick Cullinan. I represent Lake Michigan Contractors in this case. I just have, hopefully, a handful of questions for you here.

Now, one of the last things you just discussed with counsel was occasions where you had seen steel lines also break?

A. That is correct.

Q. Okay. And it sounds like it was only situations

* * *

EXHIBIT 4

[35] Q. Okay. So a runaway barge would have presented a danger to those vessels as well if that's where it occurred?

A. Yeah. If you're headed toward them, yeah.

Q. Would you agree then that the use of lines that were breaking was somewhat dangerous?

A. No, sir.

Q. Why not?

A. Because they've used them before and had no problem out of them.

Q. Okay. But how about after they started breaking?

A. Well, in my opinion it's no different than a steel cable because a steel cable can fray and it will break, too. And it's more dangerous if it breaks.

Q. In your experience are the steel cables stronger than the kevlar cables?

A. I hear they're about the same.

Q. How about in terms of whether they break or not? Is one more durable than the other?

A. I don't know durability on them.

Q. Do you recall when the kevlar lines broke if there was anyone nearby like in the area of where the line itself was?

* * *

EXHIBIT 5

[41] A. Yup.

Q. Okay. At any time when you were working on the Curly B did you feel that the facing up of that boat or the connecting or disconnecting of the barge with the dredge was – presented any danger to the deckhands?

A. You mean as far as lifting them and getting hurt or anything?

Q. As far as anything.

A. Well, it's like I told you earlier, if you're up on a barge and there's mud on it, if you don't have your feet planted solid you can get pulled overboard –

Q. Okay.

A. – from it because there's so much weight. You have to pull away from the weight to keep from losing the cable. If you slip you either have to let the cable go or it's going to pull you in. It is dangerous if you have mud on a barge.

Q. Okay. So that danger is slipping and either having to drop the cable or being pulled into the river?

A. Yeah.

Q. Okay. Any other types of dangers that you noticed while you were working on the Curly B?

[42] A. The only danger – other danger that could happen is if one of those steel cables broke and you happened to be on deck and it snapped, it would come back and it would cut you in two. It will kill you.

Q. Okay. And that particular danger would be present whether it's steel cable or kevlar cable?

A. Kevlar does not whip back like steel cable.

Q. Have you ever seen steel cable break before?

A. I've heard them snap. I've never actually seen them break.

Q. Now are you aware that the steel cable would snap back differently than the kevlar cable would?

A. Am I aware of that?

Q. Are you aware of that?

A. Yeah. I've heard some stories about it, yes.

Q. Have you ever observed the difference yourself?

A. No. I seen kevlar break.

Q. While you were working for Lake Michigan?

A. Yes.

Q. Was there any other dangers that you noticed while working on the Curly B that were presented to deckhands other than what you've mentioned?

EXHIBIT 6

Moon – Kelly Carley – 9/2/99

* * *

[39] I would assume you are talking about splicing an eye into a cable.

Q. Well, if a cable breaks, there's a one-inch cable, can it be spliced, or does it have to be replaced?

A. We throw them away.

Q. So they are never spliced?

A. I'm not saying it's never ever happened but not to my knowledge.

Q. Okay. That's all I need to know.

A. There's a couple of reasons why. It would take too long to do it and that's just not done. It's just not done. I would never recommend it.

Q. Do you know, since you have been here, have you ever heard of a facing line, steel cable, breaking?

A. Oh, yes.

Q. Does that occur often?

A. Their life span varies from one day to four months depending on sea conditions. We have had brand new ones go the day you put them on.

Q. And do you know what the life span of a plasma line would be?

A. No. I would just say off the top of my head, the average steel cable lasts far, far longer typically.

MR. CARLEY: I think that's all I have.

* * *

EXHIBIT 7

LAKE MICHIGAN CONTRACTORS, INC.

EMPLOYEE ACCIDENT FORM

Injured Employee Gene Rutherford

Employee Number _____

Job Title Deckhand

Accident Location Rochester, N.Y.

Injury Date 8/20/97

Time 1:45 [AM]-PM

Date Reported 8/20/97

Last Day Worked 8/20/97

Name & Address of Doctor/Hospital Rochester General Hospital 1425 Portland Ave. Rochester, N.Y.

Did employee return to work? [ ] Yes [X] No

If yes, date returned _____

Describe injury or alleged injury Sharp pain in lower back.

Description of accident While pulling a length of cable employee felt pain in lower back.

Witnesses Mark Clapsadle on site but not eyewitness.

Did equipment malfunction? [ ] Yes [X] No

If yes, describe on reverse side.

Describe damage to equipment or property None

What caused the accident? (See cause and effect factors on cover) Weight of cable & unfamiliarity of cable pulling techniques.

What action has been or will be taken to prevent recurrence? Synthetic lines that are stronger yet lighter weight will be reinstalled (continue on reverse side)

Supervisor and Dept. Labor Division Mgr.

Date 8-20-97

EMPLOYEE SIGNATURE Gene A. Rutherford, Jr.

DATE 8-20-97

EXHIBIT 8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
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Defendant.

Moon - Kelly Carley - 9/2/99

* * *

[23] A. Uh-huh.

Q. What was it?

A. Partek, and in addition to fire or mill hose.

Q. When you say, "mill hose," what do you mean by that?

A. Mill hose is made of a very similar – it's a very similar composition, but it doesn't have the resistance to bursting that fire hose has.

Q. Was the plasma line ever put into actual use on the Shirley Joy?

A. Yes.

Q. Do you know when that began?

A. I don't have any specific date.

Q. Prior to August 20, 1997?

A. Yes. Sometime between May and August.

Q. Wear can lessen the strength of steel cable?

A. I would presume that it can.

Q. I'm just asking you that because you said all lines at some point wear down.

A. Yeah. A steel cable is typically a 6 by 19, what's called a 6 by 19 meaning there's 6 independent strands and each one of those independent strands has 19 wires twisted and when those things start to deteriorate, we don't usually wait for them to get to that point. We replace them.

What happens is that we have some misuse occasionally by personnel who don't set them over the cleat properly.

EXHIBIT 9

* * *

[24] Here's an illustration: It comes off of the boat and comes around and goes back to the boat. Sometimes it twists and they set it on there and they don't know it's twisted until the captain takes up the slack out of it. He says, it's twisted, you have to take the slack off of it. He'll back the boat up to take the slack off and take it off and twist it over. In the meanwhile, there's a little kink and at that point they get replaced.

Q. Do you know Gene Rutherford?

A. Yes; I do.

Q. You are aware that he had an accident on August 20, 1997?

A. That's correct.

Q. Do you know if the plasma cable was in use at that time?

A. I don't know. I don't think that it was, but I really don't know. I really don't know.

Q. It is not in use at this time –

A. No.

Q. – for the Lake Michigan Contractors; is that correct?

A. That's correct.

Q. And it appears, from what you have supplied to me today – we'll mark this, but you supplied to me today regarding the Notice Duces Tecum that you only ordered it one time?

EXHIBIT 10

* * *

[15] itself, and when you turn and stuff I think that's why they're a little heavier.

Q. So there's more movement with the tug than there is with a barge?

A. Yeah.

Q. Approximately how big are the facing cables that go from the tug to the barge on that project?

A. I would say three-quarters of an inch to seven-eighths, something like that.

Q. And how about the cables from the dredge to the barge?

A. Probably a half inch to three-quarters. I'm not positive on that though.

Q. Okay. Were those various cables made of the same material?

A. Yeah. They're steel.

Q. Okay. So all the cables that were used on that prior project that you worked for a week or ten days in 1996 were steel cables?

A. Yeah.

Q. And did those cables work sufficient for the job that you were doing out there?

A. Yes.

Q. Did Mr. Byrum teach you anything in particular in terms of how you would physically either

* * *

EXHIBIT 11

Rutherford – 5/6/99

[59] Q. Are you able to bend or use your knees to attach or disconnect the cable from the front of the boat?

A. I don't see how. There's no way. I mean, you're standing there. You see this wall here (indicating)? If it's here, there's no way you can bend.

Q. Well, going back again, is that ever being disconnected either?

A. Yeah. These – this cable is continuous, I'll say. The shock is here (indicating). The cable is connected to the shock. It runs like this (indicating), and you got a loop here (indicating). And this runs back this way (indicating). There's a spot in the side of the boat here it runs through into the winch, which causes it to go in and out.

Q. Okay.

A. Now when you take these off, if this cable is stuck under the tire you have to bend over to get it out from under the tire. You cannot bend at the knees because you are against a wall already. I would be like this leaning over (indicating).

Q. Now when you're facing the tug to the barge one

* * *

EXHIBIT 12

[36] Q. Three deck hands?

A. Correct.

Q. A captain?

A. Two captains.

Q. Are they on the vessel at the same time, the two captains?

A. Typically.

Q. Captain Robinson was the number one captain; right?

A. That's correct.

Q. Mike Samsel was the salesman that you worked with regarding the plasma line from the Samsel Supply Company?

A. Not the only; no. My initial inquisition about this material was with his sister, Kathy, who is the president of their company.

Q. Kathy Petrick?

A. No. Well, it may be now. I think that was prior to her marriage.

Q. Do you know if there was a maintenance or rotation schedule ever put into effect for the plasma line?

A. No. I don't believe we ever had a chance to get that far with it.

Q. Do you have any idea, realizing you don't know when it went into service – it appears it went out of service sometime in August of '97; is that correct?

A. (Nodding head).

EXHIBIT 13

* * *

[55] A. I don't recall if I had to sign anything there on that, but he did have me read it, and then I'm not sure if that was just something, an accident report or exactly what it was. I don't remember that.

Q. Okay. Do you know whether Lake Michigan had a safety program?

A. I'm really not sure on that.

Q. Did you ever – were you required to attend safety meetings?

A. Not to – not to my knowledge, no.

Q. Were you provided any safety booklets?

A. I'm – nothing that we were each issued. Thinking back, like I say, it's been a couple years, whether there was one there on the tug – like I say, can't say for positive.

Q. How about safety equipment such as back belts?

A. Nobody, while I was on the rig, was issued anything there.

Now from what I understood, I think there was there was a – there was a back support or a – some kind of a lifting belt or something, I was told there was one there somewhere. But myself, I never used one, you know?

EXHIBIT 14

* * *

[94] A. I tried to do my job.

Q. Other than those two cables, the lifting of those two cables, had you had any problems lifting any cables before that at any time?

A. No.

Q. Okay. Anything else other than what you just mentioned in this document?

A. There's a part here, and it says, "the equipment." I can't exactly read what it says.

Q. At the bottom of Page 6?

A. Yeah.

Q. It looks like it says, "I do not believe that Lake Michigan Contractors or any of the crew or equipment was at fault or to blame for my injury, but I just think it was a freak accident."

A. I don't agree with the freak accident either. As far as the equipment, had it had the kevlars this incident might not have happened.

Q. Do you have an opinion as to whether there was anything else about the equipment that caused your injury other than the fact that they weren't using the kevlar lines?

A. I didn't have – I think it was mentioned in here somewhere about a belt, to wear a weight [95] belt. I don't recall any belts being on the boat. Because that would fall under safety procedure.

Q. Okay. Anything else? Anything else about the boats or anything else?

A. Not that I can recall.

Q. Is there anything else in the document that you think is inaccurate?

A. No.

Q. No?

A. No.

Q. You said that after you blacked out that Mark came over and assisted you?

A. Yeah. He had to walk from the head of the barge back to me to get on the boat.

Q. And did you say anything to him at that point?

A. I told him that my back was hurting bad.

Q. Okay.

A. And that I was going to go down. My legs were giving out on me.

Q. Do you recall any other conversation with him?

A. I just – see if he could help me back. I don't remember everything that happened. Like I said, I was in severe pain.

Q. Did Silver then come over to the dredge?

EXHIBIT 15

* * *

[55] A. I don't recall. if I had to sign anything there on that, but he did have me read it, and then I'm not sure if that was just something, an accident report or exactly what it was. I don't remember that.

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EXHIBIT 16

* * *

[12] Q. Yes.

A. Yeah. A little over a week, yeah.

Q. Can you tell me where you worked for that week or so?

A. Lorain, Ohio.

Q. Was there a project going on there?

A. Yeah. The Black River. It was dredging.

Q. Were you working on a – assigned to a particular vessel for that week or a little more than a week?

A. Yeah. I was on the Curly B, a tug.

Q. And generally what were your duties and responsibilities on the Curly B during that project?

A. Deckhand. I would hook up the barges to the boat to push them to take them to the dump site.

Q. Anything else?

A. Also did cleaning on the boat, painting if it was needed.

Q. Did you receive any training at that time for any of those duties?

A. I just was showed as I went, you know. Not really what you would call training, you know.

Q. Who showed you how to do things?

A. The other deckhand.

EXHIBIT 17

* * *

[16] remove or connect cables on that project?

A. Not really.

Q. Did he instruct you to watch him do it in the beginning and then learn from that?

A. Yeah. I would watch him. He would show me basically how to do it, what we had to do, and we done whatever it took to do the job.

Q. Can you tell me what you observed of how he connected the cables or disconnected them?

A. They would just bend over and grab the cable.

Q. And typically when grabbing the cables were they – was there any particular portion of the cable that the deckhand was handling?

A. It would be hung on the bow on the boat that would hang over the side. You would have to grab it. In other words, you're standing – You couldn't bend at the knees because you would bump your knee on the side of the boat. There's no way of bending at the knees. Basically it depends on how far they were draped over. You'd have to bend over, pick them up, hand them up to

the deckhand or down to him, whichever job you were doing, a full barge or an empty barge.

Q. Okay. That's with the deckhand on the boat, correct, that you can't bend at the knees?

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

(Filed Feb. 20, 2000)

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER GRANTING MOTION FOR SUMMARY JUDGEMENT

NOW COMES Plaintiff by and through counsel undersigned and pursuant to FRCP 59(e), FRCP 60(b) and L Civ R 7.4 hereby moves for reconsideration of this Court's Order of February 14, 2000 on grounds of legal error and to prevent manifest injustice to Plaintiff.

The Court has erroneously interpreted the law of negligence under the Jones Act and unseaworthiness under General Maritime and Admiralty Law. As noted in *Garrett v. Moore-McCormack Co. 317 U. S. 239, 243-245, 87 L. Ed. 239, 263 S. Ct. 246 (1942)* "the quantum of evidence necessary to support a finding of Jones Act negligence is less than that required for common law negligence. Courts routinely describe this very low evidentiary threshold as "feather weight" so that "even the slightest negligence is sufficient to sustain a finding of liability." Even marginal claims are properly left for jury determination. *Bommarito v. Penrod Drilling Corp. 929 F. 2d 186,*

189 (5th Cir. 1991). It is the clearly-established principle of causation in Jones Act cases that, to reach a jury, a seaman must demonstrate only that his employer's negligence played *any* part, even the *slightest* in producing his injury. *Havens v. F/T Polar Mist 996 F. 2d 215, 218 (9th Cir. 1993); Lies v. Farrell Lines, Inc. 641 F. 2d 765, 770-771 (9th Cir. 1981); Gautreaux v. Scurlock Marine, Inc. 107 F. 3rd 331, 338 (5th Cir. 1997) (en. banc).* At best Defendant may argue comparative negligence on the part of the Plaintiff but clearly they have failed to show that there is no genuine issue of material fact and that reasonable minds can come to only one conclusion in Defendant's favor. An employer is liabler under the Jones Act if the employer or its agents knew or should have known of a dangerous condition. Furthermore, this employer may be charged with constructive notice if in the exercise of reasonable care it ought to have discovered the alleged dangers. That this Defendant had notice of a dangerous work condition is clear. They intentionally changed from lighter Kevlar line to steel cable and they intentionally chose to assign only one crewmember to lift the steel cable estimated to weigh 120-150 lbs. Both Mr. Clapsadle and Mr. Rutherford testified to the excessive weight of the cable at times nearly dragging them overboard (Clapsadle pg. 73) (Rutherford pgs. 41 and 62). Both testified to crew complaints of back pain when using the heavier steel cable (Rutherford pgs. 60 and 61, and Clapsadle pg. 68). Weight belts were not provided for the crew (Moon pg. 34 and Clapsadle pg. 55). The Defendant's accident report provided in response to discovery indicates that the weight of the line directly caused Plaintiff's injury (see Exhibit A).

Plaintiff's second theory is based on the vessel owner's duty to furnish a seaworthy vessel and appurtenances reasonably safe and fit for their intended use. *Mitchell v. Trawler Racer, Inc. 362 U. S. 539, 549, 80 S. Ct. 926, 932, 4 L. Ed. 2d 941 (1960).* Negligent orders, insufficient crew and assigning too few crewmembers to a job breach the ship owner's duty to provide a seaworthy vessel *Drachenbery v. Canal Barge Co. 571 F. 2d 912 (5th Cir. 1978); Mascola v. Pacific Coast Transport Co. 421 F. 2d 1281, 1283 (2nd Cir. 1970).* Unseaworthiness may arise not only from the existence of defective conditions and equipment but also from any number of circumstances including an insufficient number of men assigned to perform a shipboard task. *Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482 (1967); Usner v. Luckenbach Overseas Corp. 400 U.S. 494, 499, 91 S. Ct. 514, 517-18, 27* L. Ed. 2d 562 (1971). This duty is absolute, nondelegable and results in liability without notice or fault that may be incurred without negligence. The vessel owner has a duty to furnish a seaworthy vessel including appurtenances and manpower reasonably safe and fit for their intended use. This includes the proper complement of men which serve aboard its vessels *Waldron*. This absolute duty is born from concern for the seaman's employment who by history has been deemed wards of admiralty with responsibility for their safety being placed by historical case law on the shoulders of the vessel owner. *Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).*

An unseaworthy practice does not become seaworthy merely because it is ratified by Defendant's custom,

usage or practice *Weeks v. Alonzo Cothron, Inc. 466 F. 2d 578 (5th Cir.* 1972).

ISSUES OF FACT REMAIN

This Court has dismissed Plaintiff's claims for negligence and unseaworthiness for one reason only: Plaintiff allegedly failed to ask for help prior to lifting a cable estimated to weigh 120 lbs. to 150 lbs. single handedly as he was ordered to do. The very fact that Mr. Rutherford needed additional help to lift a cable of that weight establishes Defendant's negligence in failing to assign two crewmembers to this task in the first instance. Mr. Rutherford testified to the dangerousness of the cable (Rutherford pg. 41) " . . . because there's so much weight. You have to pull away from the weight to keep from loosing the cable. If you slip you either have to let the cable go or it's going to pull you in." Plaintiff had not previously sailed, was inexperienced, and received no training as a deckhand by Defendant. Again the accident report clearly states that this was a direct cause of Mr. Rutherford's accident. The procedure that he had utilized when lifting heavy items was to bend at his knees, something that was impossible to do on Defendant's tug due to the retaining wall that surrounds its circumference (Rutherford pg. 51)

> "Q Any other jobs or any other experience that you had where you were trained in how to lift equipment or objects or anything of that nature?
>
> A There's no job I ever worked that actually showed me how to pick things up.
>
> Q Okay.

A Automatically I know to use my knees. I mean that's common sense.

Q And when you say "use your knees," can you be –

A Bend at the knees to pick up. In some cases you can't bend at the knees. Like on the boats when you're handling cables on the side you cannot bend.

Q Okay. And describe again why it is that you can't bend on the boats.

A Because you would hit your knees on the side. You got the side of the boat here (indicating), and you got to reach over the side to get a cable. How are you going to bend? You're going to bump your knees."

During the facing procedure that Mr. Rutherford and Mr. Clapsadle were involved with, Mr. Rutherford specifically testified that of the three deckhands only two were ordered out on duty "other guy has his six (6) hours off". Again at page 32 Mr. Clapsadle testified "Steve was in bed at the time". Cases are legion where Plaintiff seamen have recovered for back injuries as a result of negligence of the Defendant shipowner and unseaworthiness of their vessels when failing to provide them with adequate assistance in lifting circumstances. On all fours with the facts of this case, is the seminal case of *Waldron v. Moore McCormick 386 US 730, 87 S. Ct. 1410, 1412 (1967)* where the Supreme Court held that unseaworthiness of a vessel resulted when the Third Mate assigned two men instead of three or four to uncoil a heavy rope, and carry it 56 feet to the edge of the ship. The Court stated "by assigning two few men to uncoil and carry the heavy rope the Mate

caused both the men and the rope to be misused," See also *Cobb v. Rowe & Companies, Inc, 919 F. 2d 1089 (5th Cir. 1991)* (affirming $543,000 verdict for back injuries to seaman while lifting 35 lbs. of luggage; medical evidence supported causation); *Wilson v. Twin Rivers Towing Co., 413 F. Supp. 154 (W.D. Pa. 1976)* (Plaintiff entitled to recover for back injury sustained by lifting a "too heavy" box of meat, which rendered vessel unseaworthy); *Toucet v. Maritime Overseas Corp., 991 2d 5, 7-8, 1993 AMC 2390 (1st Cir. 1993)* (seaman jolted by grasping slipping hose, "felt his back crack" no help provided to Plaintiff but for an inept crewman as remaining crew was sleeping); *Holmes v. J. Ray McDermott & Co., 734 F. 2d 1110, 1985 AMC 2024 (5th Cir. 1984)* (back injury while lifting steel cable; $412,000 verdict affirmed). The Court must understand that while there were three deckhands assigned aboard this vessel, only two were assigned the job that Mr. Rutherford was performing and he and he alone was ordered to lift that tug cable single handedly in order to pass it to Mr. Clapsadle who was aboard the barge. The third deckhand was off watch and asleep. The fourth deckhand listed by name on Defendant's crew list was not even aboard. It is not a situation where other deckhands were on call in the area for Mr. Rutherford or Mr. Clapsadle to call if they needed assistance. Furthermore, it is not the duty of a deckhand to seek the assistance of additional crewmembers when ordered to perform a job. A crewmember cannot be held to assume the risk when ordered to perform a dangerous job. In *Hall v. American SS Co. 688 F. 2d 1062, 1069 1983 AMC 134 (6th Cir. 1982)* the Sixth Circuit held that a seaman may not be charged with fault for carrying out orders which result in injury

"even if he recognizes probable danger." See also *Salem v. U.S. Lines Co. 293 F. 3rd 121, 125 (2nd Cir. 1961)* aff'd in part, rever'd in part, *370 U.S. 31 82 S. Ct. 1119, 8 L. Ed. 2d 313 (1962)* ("a seaman assumes no risk of employment even of obvious dangers when he acts under the orders of a superior officer"), *Pedersen v. Diesel Tankers, IRA S. BUSHEY, Inc. 280 F. Supp. 421, 424 (1967)* (Plaintiff was not contributorily negligent in obeying orders he did not assume the risk), *Taylor v. Packard Diving and Salvage Co. 342 F. Supp. 365, 371 (E. D. LA 1971) aff'd 457 F. 2d 512 (5th Cir. 1972) (table)* (a seaman does not assume the risk of a lawful order even if it involves risk of injury; nor can defense of assumption of risk be applied under the label of contributory negligence in such a situation). Plaintiff's duty was to do his work as he was instructed. As in *Ballwanz v. Isthmian Lines, Inc. 319 F.2d 457 (4th Cir. 1963)*:

"if the doctrine of seaworthiness means anything, it is totally

> repugnant to the doctrine of assumption of risk on the part of seamen. The Plaintiff in this case was at the very bottom of the hierarchy of command . . . The courts have held that where a seaman has a choice between a seaworthy or an unseaworthy part of a ship his use of the latter will not relieve the owner of his responsibility. *Palermo v. Luckenback Steamship Co., Inc.*, supra. Certainly if a seaman may deliberately choose an unseaworthy part of a ship without losing his right of recovery then he is under no obligation to complain about his orders or to insist on better equipment." *Ballwanz supra.* 462

Mr. Rutherford likewise was at the bottom of the chain of command following orders. He was inexperienced and

received no training from this Defendant (Rutherford pgs. 44-45). In *Rapitis v. Sea-Land Corp., 921 F. 2d 281 (table), 1991 WL 105. 1991 U.S. App. LEXIS 85 (9th Cir. 1991)* (copy attached as Exhibit B). Plaintiff Mariner injured his back while lifting an item weighing only 40 lbs.-80lbs. The lower Court dismissed the case for the same reason that this Court has dismissed Mr. Rutherford's case finding the Plaintiff had not asked for additional help. In reversing the erroneous summary judgement the Ninth Circuit in *Rapitis* quoted from authority holding "despite a seaman's failure to ask for additional help for a task beyond his capacity" "that does not discharge the vessel from the responsibility of supplying adequate personnel available in the *first instance* for performance of the task." (emphasis added) The Court misses the point that Plaintiff raises with respect to a fourth deckhand who was assigned to this vessel but was never hired to join the vessel (see crew list Exhibit C). Had Defendant carried the full complement of men, they would have yet another opportunity to assign a second crewmember to assist Mr. Rutherford while the other deckhand who had completed his watch, was off duty. Quite a different situation than *Chisholm v. Sabine Towing & Transportation Co., 679 F. 2d 60 (5th Cir. 1982)* upon which this Court relied where four men were assigned to lift 40lb.-50 lb. pieces of scrap iron. Clearly this case has no similarity at all to *Lindemann v. Empress Casino Hammond Corp., No. 97C8938, 1999 WL 59839, at *4 (N.D. Ill. Jan. 27, 1999)* an unpublished Westlaw decision upon which this Court relied in dismissing Plaintiff's claim which dealt with numerous cocktail servers who were assigned the job of carrying loads of glasses and

had the option of lightening their load. Mr. Rutherford had no option but to lift a 120 lb. cable. The only way he could lighten his load was if Defendant used lighter line; an alternative which was clearly available to them. Pursuant to their own accident report their failure to use lighter line caused Mr. Rutherford's injury. Mr. Moon's testimony clearly reveals issues of material fact which remain regarding this Defendant's decision to discontinue use of a lighter line. Mr. Moon testified that the Kevlar line was more expensive because it required extra chaffing gear to be used to protect them from breaking. Admittedly they were as strong as the steel cable (Moon pg. 36 and Clapsadle pg. 36). Mr. Moon claims that they discontinued using the light line because of his fear that the line would snap back and injure a seaman. Mr. Rutherford and Mr. Clapsadle testified that all line breaks and snaps (Clapsadle pg. 58). Steel cable when it snaps creates even a worse hazard (Rutherford pg. 35). Mr. Clapsadle testified to Defendant having an inferior brand of Kevlar line as the reason for breakage (Clapsadle pg. 74). That it broke at the bit (Clapsadle pg. 35) because rubber hose was used (Clapsadle pg. 57). As the cross examination of Mr. Moon continued it became clear that Mr. Moon was not even discussing the Kelvar line, but he was discussing different nylon line which was not even used for facing (Moon pg. 42). There were complaints made by crewmembers that their backs were sore from lifting the steel cable (Rutherford pgs. 60 and 61 and Clapsadle pg. 68). Both Mr. Rutherford and Mr. Clapsadle testified to the propensity for being pulled overboard when steel cable was used because of its weight (Clapsadle pg. 73, Rutherford pg. 41). Thus

Defendant had two opportunities to prevent this injury to Mr. Rutherford, they could have assigned an additional crewmember or they could have used lighter line with proper chaffing gear to prevent the lines from breaking once the vessel is put to sea. Clearly, Plaintiff has sustained his featherweight burden to move forward with this case. These facts are totally inapposite to *Lyons v. Ohio River Sand and Gravel Co., 683 F. 2d 99 (4th Cir. 1982)* upon which this Court relied in upholding Summary Judgement for Defendant. In *Lyons* the Plaintiff clearly testified that he was *not* ordered to lift the plate that caused his injury single handedly. Unlike this situation Mr. Rutherford and Mr. Rutherford alone was ordered to the bow of the tug to lift a 120 lb. cable single handedly. Furthermore, in *Lyons* the full compliment of crew consisted of six men and there were six men aboard unlike the situation when Defendant's vessel was a man short leaving no one to assist Mr. Rutherford when the third deckhand was allowed to go off watch and return to his quarters to sleep. This Defendant made a conscious decision not to utilize more than one person to lift a 120 lb.-150 lb. cable.

EXPERT TESTIMONY IS NOT REQUIRED

The Court attempts to dismiss the application of *Waldron* to the facts of this case because no expert testimony was presented to create an issue of fact as to whether or not one crewmember was capable of lifting 120-150 lb. cable. Expert testimony is not required where lay witnesses are qualified to give opinions regarding the issues at hand. Third Circuit precedent has solidly established that lay witnesses may in accordance with Federal

Rule of Evidence 701 give opinion testimony. See *Teen-Ed., Inc. v. Kimball Intern., Inc. 620 F. 2d 399 (3rd Cir. 1980).* As Rule 701 states:

> "the witness is not testifying as an expert, the witnesses testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b), helpful to a clear understanding of the witness's testimony or the determination of a fact and issue."

An advisory committees note to Rule 701 states limitation (a) is the familiar requirement of first hand knowledge or observation, limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. There are numerous topics which lay witnesses have been permitted to express opinions on.

> "They include: the appearance of persons or things, identity, manner of conduct, competency of a person, feeling, degrees of light or darkness, sound, size, *weight*, distance and an endless number of things that cannot be described factually in words apart from inferences. Also included are speed of vehicle, the value of personal property, nature of substance, the witnesses own physical, mental status, the identity and physical condition of another person including such things as age, condition of health, ability to work, sanity, suffering, possession of mental faculties, hearing, eye sight, unconsciousness after an accident and intoxication to name just a few." *Michael H. Graham, Federal Practice and Procedure § 6631 (Interim ed. 1992).*

This Court has precluded Plaintiff from presenting testimony of other crewmembers who would have testified along with Mr. Clapsadle on Plaintiff's behalf relative to the weight of the cable by dismissing this case prior to trial.

CONTRIBUTORY NEGLIGENCE MITIGATES RATHER THAN BARS PLAINTIFF'S RECOVERY

In an action based on negligence under the Jones Act and doctrine of unseaworthiness, contributory negligence, if established, "results in an allocation of fault on a comparative basis rather than as a bar to recovery." *Tolar v. Kinsman Marine Transit Co., 618 F. 2d 1193, 1195 (6th Cir. 1980)* (citing *Socony-Vacuum Oil Co. v. Smith 305 U.S. 424, 431, 59 S. Ct. 262, 266, 83 L. Ed. 265 (1939)).* If Defendant can establish Plaintiff negligence this merely diminishes and does not bar Plaintiff damages.

MEDICAL EVIDENCE ESTABLISHES CAUSATION

Plaintiff's treating doctor, John Davis, M.D. was deposed on February 14, 2000. Dr. Davis's transcript was not received by Plaintiff in time to assist in defense against the dispositive motion. This evidence should be considered by this Court under FRCP 59 (e) and 60 (b). This was the subject of a motion before Magistrate Rowland while this Court was apparently deciding the Dispositive Motion (Dr. Davis's deposition is attached as Exhibit D). Dr. Davis testified that this pulling incident caused Plaintiff devastating injuries. At page 13 of his deposition he testified that Mr. Rutherford sustained a large disc herniation at L4- L5 consistent with the type of

injury which occurred to him on August 20, 1997. A laminectomy resulted (Davis pg. 16). Because of the added stress created to the rest of the spine as a result of this laminectomy, additional medical residuals have resulted (Davis pgs. 21-22 & 37). As a result a repeat surgery is now necessary to remove the 5th lamina, 3rd lamina, scar tissue at the 4th lamina and fusion of the 3rd, 4th and 5th levels (Davis pgs. 39- 40).

DEFENDANT'S OBLIGATION OF MAINTENANCE AND CURE RUN SIMULTANEOUSLY

Maintenance is a subsistence allowance to insure that a crewmember injured in the service of a ship does not starve to death. *Guevara v. Maritime Overseas Corp. 59 F. 3d 1496, 1500 (5th Cir. 1995).* While this Court has left open the question of Defendant's liability for payment of cure it has dismissed Plaintiff's claims to maintenance. Plaintiff continues to treat with Dr. John Davis who as indicated above intends to perform another surgical procedure. To the extent that Mr. Rutherford will be incapable of working following this surgery, Defendant is not only liable for the cure for the costs of these medical services but for the maintenance or the subsistence allowance as Mr. Rutherford recuperates during this cure process. This Court has erroneously taken that from him leaving him with no income in the event of surgery. To this extent this Court's ruling is inconsistent with respect to its opinion on the maintenance and cure issues. The history of Admiralty Law has clearly provided this separate cause of action to a seaman when injured in the service of a vessel. Defendant is subject to punitive damages for willful failure to provide maintenance and cure.

Negligence, fault and causation are irrelevant. *Schoenbaum, Admiralty and Maritime Law 2nd ed.* § 6-28. This duty is a continuing obligation on the shipowner's part until such time as Plaintiff has reached maximum cure *Holmes v. J. Ray McDermott & Co. 734 F. 2d 1110, (5th Cir. 1984).* This clearly has not occurred in this case based upon the recent testimony of Dr. Davis. Defendant's own investigator Stuart Platt of Platt Marine Services recommended to this Defendant that they continue to pay Mr. Rutherford maintenance and cure at a minimum at the rate of $64.00 per day (see Exhibit E). Therefore, this Court's decision to take the issue of maintenance from the Plaintiff is clearly erroneous and must be reversed.

JONES ACT: SUMMARY JUDGEMENT IS SELDOM APPROPRIATE

This is hardly a case for Summary Judgement – at least not in Defendant's favor. The authorities relied upon by the Defendant and this Court do not support a grant of summary judgement. For instance in *Chisholm* Plaintiff was not required to perform the task in question which everyone agreed was *not* dangerous unlike this present factual situation. Furthermore, *Chisholm* was decided after a full blown trial and not by way of summary judgement. Similarly *Lyons* involved a directed verdict after full presentation of facts of the case. The Trial Court's power to take away an issue from the jury by way of summary disposition or directed verdict in Jones Act or FELA cases (the sister statute to the Jones Act) is extremely limited *Green v. River Terminal Railroad Co., 763 F. 2d 805, 806-807 6th Cir. 1985); Harbin Burlington Northern Ry. Co. 921 F. 2d 129, 131 (7th Cir. 1990)* (reversing

grant of summary judgement in FELA case recognizing that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action.) *Ciarolla v. Union Railroad Co. 235 Pa. Super. 137, 338 Atlantic 2d 669 1975* ("the law is clear that only in the most frivolous cases may the Court deny FELA Plaintiff's qualified right to a jury trial") *Heater v. Cheasapeke and Ohio Railroad Co. 497 F. 2d 1243 (7th Cir. 1974); Daughenbaugh v. Bethleham Steel Corp. 891 F. 2d 1199, 1207, 1990 AMC 2049 (6th Cir. 1989)* (the Court should exercise special care in considering summary judgement in Jones Act cases.) The *Heater* and *Ciarolla* cases are particularly noteworthy. Both involved claims for back injury resulting from the negligence of the Defendant in directing or permitting Plaintiff to lift excessive weight. Both cases held that a jury issue was presented and this Court should hold likewise.

UNSEAWORTHINESS: A QUESTION OF FACT

Whether a vessel was unseaworthy is a question of fact. *Cook v. American Steamship Company, 53 F. 3d 733, 741-42 (6th Cir. 1995); Jordan v. United States Lines, Inc., 738 F. 2d 48, 50 (1st Cir. 1984); Joyce v. Atlantic Richfield Co., 651 F. 2d 676, 681 (10th Cir. 1981);*

Plaintiff's cause of action for unseaworthiness is distinct from his claim for recovery for negligence under the Jones Act. As the Supreme Court stated in *Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, 1960 AMC 1503 (1960)*:

> [I]n view of the decisions in this Court over the last 15 years [9], we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence.

362 U.S. at 550, 80 S.Ct. at 933.10 *See also Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498, 91 S. Ct. 514, L. Ed. 2d 562 (1971)* ("the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence.") It is quite possible for a vessel to be unseaworthy, "no matter how diligent, careful, or prudent the owner might have been. *Spiller v. Thomas M. Lowe & Associates, Inc., 328 F. Supp. 54, 61 (W.D.Ark. 1971). aff'd. 466 F. 2d 903 (8th Cir. 1972).*

CONCLUSION

Numerous questions of fact remain as to whether or not this ship was unseaworthy as a result of the failure of Defendant's Supervisors to provide Plaintiff a safe place in which to work, negligence in providing a complement of crewmen as designated on Defendant's crew list, failure to discharge appropriate number of human bodies to perform the task in safety, failure to utilize lighter line when reasonable as previously used on its tug and other vessels, failure to train Plaintiff and, failure to provide weight belts. Plaintiff is entitled to his day in Court where he presents issues which are not shown to be sham, frivilous or so unsubstantial that it would obviously be futile to try them. *Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965).* For all the reasons set forth in this brief Plaintiff prays that this Court reconsider its

grant of Summary Judgement in Defendant's favor and reverse its opinion on the issues of negligence, unseaworthiness, and maintenance.

Respectfully submitted,

THE JAQUES ADMIRALTY LAW FIRM, P.C.

BY: /s/ Judith A. Schornack-Smith
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DATED: February 25, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,
Plaintiff,
v.
LAKE MICHIGAN CONTRACTORS, INC.,
Defendant.

Case No. 1:98-CV-769
Honorable Wendell A. Miles

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and says that on the 25th day of February, 2000, she served *Plaintiff's Motion For Reconsideration Of This Court's*

Order Granting Motion For Summary Judgement and *Certificate of Service* in the above matter and a copy upon the following via regular U.S. mail delivery:

John A. O'Donnell
Belgrade and O'Donnell, P.C.
311 South Wacker Dr., Ste. 2770
Chicago, IL 60606

/s/ Sherri S. Rivard
SHERRI S. RIVARD

Subscribed and sworn to before me
this 25th day of Feb., 2000.

/s/ Eileen M. Chmielewski
NOTARY PUBLIC

EILEEN M. CHMIELEWSKI
NOTARY PUBLIC MACOMB CO., MI
MY COMMISSION EXPIRES Oct 8, 2004
ACTING IN WAYNE COUNTY, MI

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENE A. RUTHERFORD, JR.,

Plaintiff,

-vs-

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.
_____/

File No.:
1:98 CV 769

HON.
WENDELL A. MILES

Deposition of GENE A. RUTHERFORD JR. taken under the provisions of the Federal Rules of Civil Procedure before Carrie S. Clark-Berry (CSR-4402), Certified Shorthand Reporter and Notary Public, Sukup & Grimm 146 Monroe Center NW Suite 1526, Grand Rapids, Michigan, on Thursday, May 6, 1999, commencing at 11:32 a.m., pursuant to Notice.

* * *

[35] Q Okay. So a runaway barge would have presented a danger to those vessels as well if that's where it occurred?

A Yeah. If you're headed toward them, yeah.

Q Would you agree then that the use of lines that were breaking was somewhat dangerous?

A No, sir.

Q Why not?

A Because they've used them before and had no problem out of them.

Q Okay. But how about after they started breaking?

A Well, in my opinion it's no different than a steel cable because a steel cable can fray and it will break too. And it's more dangerous if it breaks.

Q In your experience are the steel cables stronger than the kevlar cables?

A I hear they're about the same.

Q How about in terms of whether they break or not? Is one more durable than the other?

A I don't know durability on them.

Q Do you recall when the kevlar lines broke if there was anyone nearby like in the area of where the line itself was?

* * *

[41] A Yup.

Q Okay. At any time when you were working on the Curly B did you feel that the facing up of that boat or the connecting or disconnecting of the barge with the dredge was – presented any danger to the deckhands?

A You mean as far as lifting them and getting hurt or anything?

Q As far as anything.

A Well, it's like I told you earlier, if you're up on a barge and there's mud on it, if you don't have your feet planted solid you can get pulled overboard –

Q Okay.

A – from it because there's so much weight. You have to pull away from the weight to keep from losing the cable. If you slip you either have to let the cable go or it's going to pull you in. It is dangerous if you have mud on a barge.

Q Okay. So that danger is slipping and either having to drop the cable or being pulled into the river?

A Yeah.

Q Okay. Any other types of dangers that you noticed while you were working on the Curly B?

* * *

[44] I'm sorry, but when you started working full time did you receive any training – when you began working full time as a deckhand did you receive any other training or formalized training by anyone at Lake Michigan Contractors?

A As being a deckhand?

Q Right.

A No, sir.

Q Were you ever given any pamphlets or anything like that on safety procedures to read or any literature of any sort to read?

A As to being a deckhand?

Q Yeah.

A No, sir.

Q At any time in being a Lake Michigan Contractors employee were you ever given any material to read?

A When I was first hired they give you a paper about the drug deal and stuff like that. That's the only thing I can recall that I was gave to read.

Q Okay. I'm going to show you what we've already had marked as Deposition Exhibit #1.

A Yeah, I remember that.

Q After you've had a chance to look at that would [45] you please let me know.

(Witness examines document.)

A Yeah, I remember getting this.

Q Okay. So you have prior to today seen a copy of what's been marked as Exhibit #1?

A Yeah. But the only problem with this is they're talking about safety. I never had actual training as being a deckhand.

Q I understand.

A Well, I – what I'm going to say is they had us do a lot of things that was unsafe, and if you pertain it to this they should have never done it.

Q Okay. But just sticking with this exhibit, prior to today have you ever seen that document?

A Yeah. This was gave to me when I was hired.

Q Okay. When you were hired for the painter's job or as a deckhand?

A When I became a permanent employee this was there. Because I had to go get a physical. They gave me this when I had my physical and everything.

Q So that was 1996?

A Yes.

Q Okay. And do you recall who gave it to you?

* * *

[51] nothing to show. You just grab it. You're just standing there, you grab it, and throw it up on the mold.

Q Any other jobs or any other experience that you had where you were trained in how to lift equipment or objects or anything of that nature?

A There's no job I ever worked that actually showed me how to pick things up.

Q Okay.

A Automatically I know to use my knees. I mean that's common sense.

Q And when you say "use your knees," can you be –

A Bend at the knees to pick up. In some cases you can't bend at the knees. Like on the boats when you're handling cables on the side you cannot bend.

Q Okay. And describe again why it is that you can't bend on the boats.

A Because you would hit your knees on the side. You got the side of the boat here (indicating), and you got to reach over the side to get a cable. How are you going to bend? You're going to bump your knees.

Q Okay. On the barge there's no sides, right?

A On the barge itself?

* * *

[60] of the deckhands is standing on the front handing the cable to the deckhand who's on the barge?

A Yeah. One deckhand here handling the cables to hand them over to the barge over here (indicating).

Q Okay. And the deckhand that's on the barge is on the flat surface with nothing obstructing him from using his knees to bend, correct?

A Right.

Q Okay. Did any of the crew members of the Shirley Joy ever complain about any of the equipment they were provided on the Rochester project?

A Complain about the equipment?

Q Right.

A I've heard guys say their back is sore from lifting cables. I mean –

Q Did you ever hear any complaints about the cables themselves that they were using either being defective or not sufficient to allow them to do whatever they were doing?

A Not that they were defective. I mean they get old, they get frayed, like I told you. That's expectable, I guess. They're hanging in the [61] water, they get rusty.

Q Okay. Did you ever hear anyone complaining about the condition of the cables?

A There's been times they say we're going to have to change them because they were looking bad and frayed. What I mean by "frayed" is they're steel and you have spots that break loose that come out in your hand and it cuts your hand.

Q Okay. Did you ever hear anyone on the crew of the Shirley Joy complaining about anything else having to do with the cables aside from the fraying?

A Just, like I said, they said their back was sore from lifting them.

Q And did those complaints have anything to do with the physical qualities of the cable themselves?

A The cables are heavy. There's no doubt about it. I mean you take steel, compare it to kevlar, a 100 percent difference.

Q Would the amount of cable that you had to handle in working as a deckhand at any given time be more than 25 pounds?

A Oh, yeah. Definitely.

Q Can you give me a rough estimate of what the [62] weight – the amount of weight that you were actually lifting was?

A I could not say. I have no idea. It's enough weight that it will pull you in if you don't watch.

Q Was it more than 50 pounds?

A Oh, it was more than 50 pounds, yeah.

Q Was it more than 100 pounds?

A I'm not sure.

Q So somewhere between 50 and 100 pounds?

A Yeah, something like that. It's dead weight. If you've lifted dead weight before you know what I'm talking about.

Q Okay. How about the condition of the Shirley Joy itself or the barges? Did you ever hear anyone complaining about the condition of the barge being either defective or insufficient to allow you to do the work you were doing?

A There's just been times, like I said, that there was debris on there and you have to be careful. They tell you to be careful. I mean, it's a dangerous job.

Q Is one of the jobs of the deckhand to clean up the debris, whatever debris may exist on the vessel, the Shirley Joy?

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

- vs - Case No. 1:98-CV-769

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

Telephone deposition of MARK DAVID CLAPSADLE, taken pursuant to Notice, at 141 Pin Oak Drive, Williamsville, New York, on July 8, 1999, commencing at 11:20 a.m., before ADRIANNE HUNT, C.P., Notary Public.

* * *

[35] facing wires?

A. They were using them, like I say, I believe they had a set on before I got there, and then they had more of them out and went back to steel cable.

Once I was on the rig, they removed the steel and went to a new set of the Kevlar, and after the new set of Kevlar, we wore the new set of Kevlar out, then we went back to the steel cable.

Q. When you say you wore the Kevlar out, how do you wear the Kevlar out? Explain that to us.

A. Well, you have the Kevlar hooked up the same as your steel cable. The loose end would be hooked into the side of the tug. You run the hoop or the loop out around your bit on the barge and back to the winch. Now as you're winching that up, that line is sliding across the bit on the barge. That's where you wear out your lines, they wear out just from sliding on the steel bit.

Q. Okay. So it was your understanding that the Kevlar line was worn out and that was the reason they switched to the cable?

A. That's correct.

Q. Do you know if Lake Michigan carried extra Kevlar [36] lines on board the tug?

A. At the time they had no more, that's why we had gone back to the steel.

Q. So it was your understanding that you were using steel because there was no more Kevlar line available?

A. Correct.

Q. Is the Kevlar line strong enough to use for facing purposes, then? F-A-C-I-N-G.

A. Yes, it is.

Q. Okay. Let's go back to August 20th, then. After the hemp line – let's go back over that testimony for sure.

There was cable, you believe, when you first joined the vessel?

A. Yes.

Q. Was there a hemp rope connected at that time?

A. At that time I don't believe there was a hemp line on that cable.

Q. And at some point they switched to the Kevlar?

A. Yes.

Q. At some point the Kevlar line wore out and the cable was again used?

A. Yes.

* * *

[55] A. I don't recall if I had to sign anything there on that, but he did have me read it, and then I'm not sure if that was just something, an accident report or exactly what it was. I don't remember that.

Q. Okay. Do you know whether Lake Michigan had a safety program?

A. I'm really not sure on that.

Q. Did you ever – were you required to attend safety meetings?

A. Not to – not to my knowledge, no.

Q. Were you provided any safety booklets?

A. I'm – nothing that we were each issued. Thinking back, like I say, it's been a couple years, whether there was one there on the tug – like I say, I can't say for positive.

Q. How about safety equipment such as black belts?

A. Nobody, while I was on the rig, was issued anything there.

Now from what I understood, I think there was a – there was a back support or a – some kind of a lifting belt or something. I was told there was one there somewhere. But myself, I never used one, you know?

* * *

[57] Captain decided we'd go with the one-inch steel wire?

A. Well, what it was, we kept breaking that Kevlar. We snapped it off, we would put a new eye on the end of it to where that would totally change where you're wearing, because of the length you're cutting it shorter, and then we snapped it again there, you know.

That was something with the – sometimes that weather would kick up when you're pushing, sometimes you couldn't even push, we had to go to a tow, to tow the loaded one out to dump. You can only take so much rock and roll with the tug tied to the barge.

Q. Okay. And it was snapping off, where did you describe it?

A. Right where it goes around the bit, we would just wear it.

Q. Okay.

A. Even with those, we tried to run pieces of fire hose, you know, pieces of rubber hose, anything that we could put over that to stop it from chafing.

Q. From rubbing?

A. Yeah, rubbing it raw there, yeah.

Q. Okay. Have you had occasion to see steel cable

* * *

[68] Clapsadle – Cullinan – 07/08/99

Q. Withdraw that question.

Did you ever find or have any problems with the use of steel cables in the other marine jobs you've had?

A. No, that's all I've ever used.

Q. Prior to August 20th, did Gene Rutherford ever complain about the use of steel cables to you?

A. Well, that was something we all more or less complained, you know, it was just a pain. Once we had the lightweight Kevlar, they were nice, they were easy to handle but, you know, it was a thing of that's what we had, that's what was on there and that's what we used.

Q. And again, you were using those because the Kevlar were breaking?

A. Correct.

Q. When the barge was being unhooked from the dredge, what was the level of the barge as compared to the dredge?

A. With the loaded barge coming off of the dredge, you were, I would say, deck-to-deck, you were just a little bit lower than the dredging rig.

Q. Just a matter of a couple inches?

* * *

[73] Clapsadle – Shornack-Smith – 07/08/99

when you're lifting that hoop?

A. More or less, you always use two hands.

Q. Is it pulling you with it?

A. Well, it all depends there on, like I say, how you're set there. As long as you're ready for it – if you're – if you're off balance or you're not – if you're not ready for it, or even to hit something slick, that, you know, if you hit a wet spot or it may be a muddy spot there on the barge, there's times where you have to just let it go, let it go right to the water.

Q. But your expectation is that you've got to brace yourself when you're lifting cable, versus the Kevlar line, correct?

A. Correct. Just the weight difference there.

Q. And that's why the guys prefered the Kevlar?

A. Yeah. It was just easier to handle.

Q. Do you know who the supplier of that Kevlar line was?

A. No, I don't. I don't really know nothing on where they get any of their supplies or anything like that.

Q. Do you know if there are other – if there are [74] different types of Kevlar lines?

A. Yes, there are. There are – the Kevlar brand, which is probably the best. Now this is just from what I understand. Like I say, I haven't never really bought any or really dealt with it other than those.

But from what the other guys were saying that have used them, that them [sic] didn't seem like they were, I would say, as good a brand, or what it was there, you know? I'm not – like I say, I really – really can't say there.

Q. Do you know, would it be Mr. Moon or somebody land-based that controls the purchasing equipment for the vessel?

A. Yes, it would be.

Q. So you can't say as we speak here whether there was something wrong with that particular Kevlar line that resulted in its breaking twice within that close period of time?

A. No, I couldn't.

Q. And you don't know that that wasn't the problem either, do you, sir?

A. No. Like I say, I really haven't dealt with that Kevlar except for on the Shirley Joy at that time.

* * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

– – –

GENE A. RUTHERFORD, JR.,	)	
Plaintiff,	)	
vs.	)	Case No. 98CV769
LAKE MICHIGAN CONTRACTORS, INC.,	)	Judge Miles
Defendant.	)	

– – –

Transcript of deposition of WAYNE MOON, Agent of Defendant herein, called by the Plaintiff as upon cross-examination, pursuant to Notice and Court Order, pursuant to the Federal Rules of Civil Procedure, before Denise C. Winter, a Registered Merit Reporter and Notary Public within and for the State of Ohio on Thursday, September 2, 1999, at the offices of Merit Reporting Services, 2000 East Ninth Street, Suite 310, Cleveland, Ohio, commencing at 10:00 a.m. and concluding at 11:15 a.m.

– – –

* * *

[34] deck hands?

A. Not to my knowledge.

Q. Do you know if Lake Michigan Contractors supplies weight belts or anything like that for use by deck hands?

A. Yes.

MR. CULLINAN: I object to that and I'll let him answer that one question. We're not going very far with anything other than lines. Go ahead. You can answer that.

A. Yes.

Q. Why is that done? Why do they have a weight belt?

MR. CULLINAN: That's it.

BY MR. CARLEY:

Q. Is it because of the fact of the steel cables, lifting the steel cables?

A. Many factors.

Q. Is that one of them?

MR. CULLINAN: I'm going to object. Don't answer that question.

A. No – okay.

MR. CARLEY: Why don't we give him a call because I want to get this answered?

MR. CULLINAN: Go ahead.

MR. CARLEY: Would you read the last two questions back, please?

* * *

[36] Q. Three deck hands?

A. Correct.

Q. A captain?

A. Two captains.

Q. Are they on the vessel at the same time, the two captains?

A. Typically.

Q. Captain Robinson was the number one captain; right?

A. That's correct.

Q. Mike Samsel was the salesman that you worked with regarding the plasma line from the Samsel Supply Company?

A. Not the only; no. My initial inquisition about this material was with his sister, Kathy, who is the president of their company.

Q. Kathy Petrick?

A. No. Well, it may be now. I think that was prior to her marriage.

Q. Do you know if there was a maintenance or rotation schedule ever put into effect for the plasma line?

A. No. I don't believe we ever had a chance to get that far with it.

Q. Do you have any idea, realizing you don't know when it went into service – it appears it went out of service sometime in August of '97; is that correct?

A. (Nodding head.)

* * *

[42] RE-CROSS-EXAMINATION OF WAYNE MOON

BY MR. CARLEY:

Q. When you worked for Great Lakes Dredge and these lines were breaking, coming back and breaking people's legs, was that plasma or steel cable?

A. Neither.

Q. What was it?

A. Polypropylene or nylon. I can only tell you that a flexible – a mooring device of a flexible nature will do that regardless of its specific composition.

Q. Do you know whether or not Great Lakes used the nylon?

A. In a variety of applications like we do.

Q. In facing operations?

A. No. No, never, to my knowledge. Nylon isn't used in facing operations except for shock purposes.

Q. What was the nylon used for that would snap back?

A. It was an uncommon occurrence, but it happened to a number of people over the years. The application would be when you're mooring a barge to a dock and the momentum of the tug and the barge is continuing on after you have thrown a line and hit a cleat on the dock and secured it on the cleat on the barge and either wind momentum from the tug's engine or whatever.

I mean, you're using it a lot of times to stop the barge and the line gets taut and the diameter gets narrower

* * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

-vs-

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

JUDGE MILES
CASE NO. 1:98-CV-769

Videotape deposition of *JOHN A. DAVIS, JR., M.D.*, taken as if upon direct examination before Sandra L. Mazzola, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of MetroHealth Medical Center, 2500 MetroHealth Drive, Cleveland, Ohio, at 3:05 p.m. on Monday, February 14, 2000, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

* * *

[21] well, why is that relevant. Because if you herniated a disk at L5-S1 and you go in and you do a diskectomy, that level is inherently more stable. In other words, it has support from other structures.

The 4-5 disk, on the other hand, is a bad disk to herniate because once you herniate that disk, that disk space level is theoretically out of the pelvis. It doesn't have those stabilizing structures. So biomechanically, things change when you lose the support at the L4-5 level. Instability begins to become a much larger factor.

Now, as this instability or stress builds up in this lower level, the other levels tend to compensate. So at 3-4 and 5-1 those segments take on an added load. And they start to try to compensate for lack of motion at this other level, at 4-5. So as time goes along, typically the joints in the back between the third and fourth vertebrae and between the fifth vertebrae and the tailbone, they tend to enlarge because as they take on added stress, they try to distribute that stress by making themselves larger. It's like anything does. Like in a knee, for [22] instance, with arthritis, it will try to make itself bigger if it's bearing weight abnormally.

So as the bone – as the bone joint makes itself larger, it tends to grow into the space for the nerve so it creates stenosis often at the levels above and below a disk herniation or a change in biomechanics within the spine.

Q. Doctor, with regard to your February 26, 1998 visit, what occurred at that time?

A. Well, he returned for an evaluation. He seemed to be doing well. He was requesting at that time that he return to work. He had been undergoing the aquatic therapy program and the physical therapy land-based program and had seemed to have done well with that.

I found his physical exam to be essentially normal. His reflexes were normal. His muscle strength normal, negative straight leg raising. His sensation was intact, and I felt that his gait appeared fairly normal also. So I gave him a note that stated that he could return to work on March the 2nd, and I asked him to follow up with me in May or June of that year.

Q. Okay. Were there any restrictions given to him at that time?

* * *

[37] looks fairly good with the exception of some disk bulging at 5-1 and some joint enlargement at 5-1 which narrows the space for the nerves, too.

So I think that both of those really kind of come from the fact that biomechanically he's changed significantly at 4-5, and these other levels are taking on a little added stress and these joints are getting a little large, and as they do, they're growing into the space for the nerves.

VIDEOTAPE TECHNICIAN: Off the record.

(Thereupon, a discussion was had off the record.)

VIDEOTAPE TECHNICIAN: Back on the record.

Q. Doctor, so what we we're seeing now is some problem occurring at L3 and L4, correct?

A. That's correct.

Q. Okay. And that is right above the disk area where he had the original injury, correct?

A. That's correct.

Q. Okay. And you're also seeing a problem now at

* * *

[39] to need a revision lumbar decompression and instrumented fusion.

Q. Okay. Can you explain to the jury what that is?

A. Yes. By revision I mean a repeat surgery. It would involve the removal of the fifth lamina, the removal of the third lamina, and in addition, a removal of scar tissue at the level of the fourth lamina, which is gone now.

So this is space, but you would have to revisit the nerve roots at this level and remove any scar and disk – the recurrent disk herniation that's occurred at that level. So once you do that, that's the decompressive portion of the procedure.

The fusion portion of the procedure is a stabilization and that is done utilizing rods and screws. Now, we tend to use pedicle screws which are screws that go through these columns of bone that connect the root to the body of the vertebra. So the screw goes down through inside this column of bone into the body of the vertebra. So that would involve a screw at the third, fourth and fifth level and potentially at the sacral level depending on the amount of bone resecting that would need to be done. So once [40] you put these screws in place, you connect those screws with a rod.

Now, in addition to that, bone is harvested from back here, from the pelvis through the same skin incision, and bone is placed along these transverse processes to grow together and form the fusion. So the rods and the screws

simply act as an internal splint. They provide instant stability. But the long-term stability comes from bone growth and the bone growing on either side of the spine.

Q. Okay. Is the hardware left in forever?

A. Traditionally, yes.

Q. Okay. Does the spine lose some mobility when you have a fusion procedure such as the – such as the one you described?

A. Definitely.

Q. Okay.

A. I tell every patient that in reality fusion is a nonphysiologic process; that every segment should have some motion to it; it was made to move, and in a certain way; that fusion itself stiffens or creates stiffness to the spine. But in some situations it's a very good procedure. It's about the best thing we have in the year 2000 for

* * *

EXHIBIT A

LAKE MICHIGAN CONTRACTORS, INC.

EMPLOYEE ACCIDENT FORM

Injured Employee Gene Rutherford

Employee Number _____

Job Title Deckhand

Accident Location Rochester, N.Y.

Injury Date 8/20/97

Time 1:45 [AM]-PM

Date Reported 8/20/97

Last Day Worked 8/20/97

Name & Address of Doctor/Hospital Rochester General Hospital 1425 Portland Ave. Rochester, N.Y.

Did employee return to work? [ ] Yes [X] No

If yes, date returned _____

Describe injury or alleged injury Sharp pain in lower back.

Description of accident While pulling a length of cable employee felt pain in lower back.

Witnesses Mark Clapsadle on site but not eyewitness.

Did equipment malfunction? [ ] Yes [X] No

If yes, describe on reverse side.

Describe damage to equipment or property None

What caused the accident? (See cause and effect factors on cover) Weight of cable & unfamiliarity of cable pulling techniques.

What action has been or will be taken to prevent recurrence? Synthetic lines that are stronger yet lighter weight will be reinstalled (continue on reverse side)

Supervisor and Dept. Wayne Moon/Ohio Division Mgr.

Date 8-20-97

EMPLOYEE SIGNATURE Gene A. Rutherford, Jr.

DATE 8-20-97

921 F.2d 281 (Table)
Unpublished Disposition

(Cite as: 921 F.2d 281, 1991 WL 105 (9th Cir. (Wash.)))

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Emmanuel RAPITIS, Plaintiff-Appellant,

v.

SEA-LAND CORPORATION, Defendant-Appellee.

No. 90-35377.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 6, 1990.

Decided Jan. 2, 1991.

Appeal from the United States District Court for the Western District of Washington; Carolyn R. Dimmick, District Judge, Presiding.

W.D. Wash.

REVERSED AND REMANDED.

Before GOODWIN, Chief Judge, and EUGENE A. WRIGHT and NOONAN, Circuit Judges.

MEMORANDUM*

Appellant Emmanuel Rapitis brought this Jones Act and unseaworthiness claim against appellee Sea-Land Corporation, alleging Sea-Land's negligence and the unseaworthiness of its vessel, the SL Kodiak, caused an injury to his back.

Rapitis, a 66 year old seaman, worked aboard the Kodiak as a QMED (qualified man engine department). A QMED is expected to perform all tasks assigned to him. The first engineer, Exum, ordered Rapitis to move three chainfalls, one at a time, up a ladder to a storage area 100 feet away. The chainfalls weighed between 40 and 80 pounds each. Normal procedure required Rapitis to place the chainfalls on his back and not let them drag on the deck of the ship. Exum did not offer the assistance of another crew member, and Rapitis did not request help.[1] While Rapitis was carrying the last chainfall he felt his back go out.

Before boarding the Kodiak, Rapitis checked a box in his declaration of health form indicating he had no prior back injuries. But in 1980 Rapitis was in an automobile accident and received a $50,000 settlement for a resulting back injury. Rapitis said he checked the box because he had worked "steady" for six and one-half years without having any problems with his back.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir.R. 36-3.

[1] On a previous occasion, when lifting metal deck plates, Rapitis requested assistance and it was provided.

Wessels, a second engineer aboard the Kodiak with 38 years of experience at sea, stated it is "against all principles" for a seaman to carry a chainfall by himself, unless the seaman "drags it along the deck plates." He further stated he had "never heard of anyone ask[ing] a man to carry a two-ton chainfall any kind of distance without being assisted by someone else." When asked whether he would normally assign two people the same job assigned Rapitis, Wessels replied "I would, yes."

When subsequently asked whether carrying two-ton chainfalls is a one man job, Wessels stated, "Yeah, a man can carry a two-ton chainfall. Most people carry a two-ton chainfall around if they need it somewhere. If they need it somewhere where it's like a longer distance, they always get help." When asked the same question again, Wessels replied: "Yes you can give it to one man. Depends on his condition, you know, if it's an older man, like you know, I mean I'm 58 myself now, I wouldn't do it any more, but I could do it just as easily."

Based on these facts the district court concluded there were no genuine issues of material fact for trial and granted summary judgment. We reverse.

DISCUSSION

1. Standard of Review

This court reviews the grant of a summary judgment de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, 110 S.Ct. 3217 (1990). In our review we must determine "whether, viewing the evidence in a light most favorable to the

nonmoving party, there are any genuine issues of material fact and whether the district court applied the relevant substantive law." *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989) (citation omitted).

2. The Applicable Legal Standards

Rapitis sues under both the Jones Act and the doctrine of unseaworthiness. Under the Jones Act an employer is liable for the injuries of his crew when the employer is negligent. 46 U.S.C. § 688; 45 U.S.C. § 51 et. seq. But the negligence standard for personal injury actions brought under the Jones Act is substantially lower than in regular tort actions. *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770-71 (9th Cir.1981) (Jones Act cases require a very low evidentiary threshold for submission to the jury); accord *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir.1989), *cert. denied*, 110 S.Ct. 1783 (1990) ("A seaman in a Jones Act case has only a 'featherweight' burden of proof; he need prove only slight negligence, 'which can be accomplished by very little evidence.' ") (quoting *Allen v. Seacoast Prods.*, 623 F.2d 355, 360 (5th Cir.1980); *Petersen v. Chesapeake & Ohio Ry.*, 784 F.2d 732, 740 (6th Cir.1986) (same).

Because of the low standard of negligence, summary judgment is not favored in Jones Act cases: "Courts should exercise special care in considering summary judgment in Jones Act cases which require a very low evidentiary threshold for submission to the jury." *Lies*, 641 F.2d at 770. Summary judgments "are to be cautiously granted, and 'if there is to be error at the trial level it

should be in denying summary judgment in favor of a full live trial.' This is especially true in the case of actions brought under the Jones Act." *Id.* at 772 (citations omitted).

Ship owners also have the duty of providing their crew with a seaworthy vessel. Negligent orders, having insufficient crew members, and assigning too few crew members to a job all breach this duty. *See,* e.g., *Drachenberg v. Canal Barge Co.,* 571 F.2d 912, 918 (5th Cir.1978); *Mascola v. Pacific Coast Transport Co.,* 421 F.2d 1281, 1283 (2d Cir.1970).

3. The Summary Judgment Below

The district court found the relevant issues in the Jones Act claim to be 1) whether Sea-Land's order was "negligent"; and 2) whether the order "caused" Rapitis' back injury.[2] The negligence and causation standards in maritime actions are well established in this circuit. "The general rule in personal injury actions brought in admiralty (both under the Jones Act and general maritime law) and under the FELA is that contributory negligence is not a complete bar to recovery but it does operate to reduce the amount of the damage award." *Kopczynski v. The Jacqueline,* 742 F.2d 555, 558 (9th Cir.1984), *cert. denied,* 471 U.S. 1136 (1985).[3] And causation is "generally a question

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[2] The court also found the relevant issue in the unseaworthiness claim to be whether the order was negligent and relied on its Jones Act analysis to conclude that it was not.

[3] The Supreme Court has noted: "The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely

of fact for the jury, unless 'the proof is insufficient to raise a reasonable inference that the act complained of was the proximate cause of the injury.' " *Lies*, 641 F.2d at 770 (citation omitted). Proximate cause is "a mixed question of law and fact, which is generally sufficient to preclude summary judgment." *Id.*; *Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 609 (9th Cir.1990).

The district court granted summary judgment because Rapitis "knew" that his job aboard the Kodiak would require heavy lifting, and because he did not request assistance when lifting the chainfalls. But summary judgment should not be granted when a dispute is genuine, i.e., when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Under the liberal negligence and causation standards in Jones Act cases, Rapitis' negligence, if any, in accepting work as a QMED and in not asking for assistance would not bar a reasonable jury from returning a verdict in his favor; rather, it would operate to reduce the amount of a potential award. *Kopczynski*, 742 F.2d at 558. As succinctly put by the Fifth Circuit:

> [A] seaman may fail to observe proper care for his own safety in failing to seek the help of others aboard ship, once he realizes or should realize that an assigned task is beyond his individual capacity. But that does not discharge the vessel from the responsibility of supplying adequate personnel available in the first instance for performance of the task.

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incompatible with modern admiralty policy and practice." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953).

Moschi v. Steamship Luckenbach, 424 F.2d 1060, 1061 (5th Cir.1970) (emphasis added) (citation omitted).

A genuine issue therefore existed even if Rapitis accepted his job knowing it would require heavy lifting and did not ask for help with the chainfalls. In Jones Act cases the test for a jury case

> is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

Lies, 641 F.2d at 771 (quoting *Rogers v. Missouri Pac. R.R.,* 352 U.S. 500, 506-07 (1957).

The district court also reasoned summary judgment was appropriate because Rapitis did not reveal a prior back injury in his declaration of health form. But, as with contributory negligence, a seaman's failure to reveal a prior injury does not preclude a reasonable jury from rendering a verdict in his favor. The Supreme Court in *Still v. Norfolk & Western Ry.,* 368 U.S. 35 (1961) held that an employee's fraud in failing to reveal a prior injury did not destroy his negligence claim brought under FELA. In applying Still's reasoning to admiralty cases, the Second Circuit reasoned:

> We are unable to perceive any relevant difference in policy on this issue between the FELA and either the Jones Act or appellee's action for unseaworthiness which would dictate a different result here. (citation omitted). The decision in *Still* was predicated on the dominant congressional policy of compensating injured workers, overriding the alleged fraud in forming the employment relationship. The same overriding policy is present here.

Compton v. Luckenbach Overseas Corp., 425 F.2d 1130, 1133 (2d Cir.), *cert. denied*, 400 U.S. 916 (1970).

This court has come to the same conclusion: "[t]he decision in *Still* compels a holding that a person . . . who is a 'seaman' and suffers injury in the course of his 'employment' . . . within the ordinary meaning of those [two] words, is not barred from suit under the Jones Act because he conceals a material fact in applying for employment." *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 530 (9th Cir.1962). Under *Compton* and *Gypsum Carrier*, a genuine issue existed even though Rapitis failed to reveal his prior injury.

Finally, the district court, reviewing Wessels' vacillating testimony, concluded the record as a whole indicated that lifting and carrying two-ton chainfalls is regularly done by one person. We must view the evidence in the record and the inferences therefrom "in a light most favorable" to Rapitis. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir.1989). Under this standard we believe a reasonable jury could conclude it was negligent for the first engineer to assign a 66 year old seaman the individual task of carrying three 40 to 80 pound chainfalls up a ladder to a storage area 100 feet away. A second engineer with 38 years experience stated it was against all

principles for one person to carry such a chainfall, that he would normally assign two men to the task given to Rapitis, and that he had "never heard of anyone ask a man to carry a two-ton chainfall any kind of distance without being assisted by someone else." *See supra*, p. 2-3. These statements from an experienced seaman are probative; they suggest the first engineer's order may have been negligent. *See Anderson*, 477 U.S. at 249-50.

Wessels' subsequent statement that a seaman can carry a heavy chainfall by himself, depending on his age and condition, does not nullify these probative statements. All inferences in Wessels' testimony "are to be drawn in the light most favorable to the nonmoving party. Moreover, if the nonmoving party adduces direct evidence of a genuine issue of fact, such evidence is not to be weighed against the moving party's conflicting evidence, but rather is to be submitted to the trier of fact for resolution." *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir.1987) (citations omitted). Even though a 66 year old seaman "can" carry a two-ton chainfall by himself, Wessels' testimony suggests it may be unsafe and negligent to ask him to do so.

REVERSED AND REMANDED.

EXHIBIT C

CREW LISTS FOR:

M/V SHIRLEY JOY (for weeks ending 8/16 and 8/23/97)

Tug Captains:

Rix Robinson
9673 Fleming Grant Road
Sebastian, FL 32976
Phone 407-664-8126

Thomas Dawes Jr.
930 Remington Dr.
N. Tonawanda, NY 14120
Phone 716-743-0237

Thomas Dawes Jr.
1369 Sweeney
N. Tonawanda, NY 14120
Phone 716-694-0606

Deckhands:

Steve Byrom
8040 Robertson Place
Highland, IN 46322
Phone 219-838-3751

Mark Clapsadle
580 Oliver St. #2
Tonawanda, NY 14120
Phone 716-695-8751

Gene Rutherford
3053 W. 51st St.
Cleveland, OH 44102
Phone 216-651-5874

Patrick Smith
3402 W. 148th St.
Cleveland, OH 44111
Phone 216-251-1367

NOTE: Crews were same both weeks with the exception that Dawes Sr. worked 8/11-8/16 w/e 8/16/97 and 8/17-8/20 w/e 8/23/97 and Dawes Jr. worked 8/10-8/11 w/e 8/16/97 and 8/20-/23 and w/e 8/23/97.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,

Plaintiff,

-vs-

LAKE MICHIGAN CONTRACTORS, INC.,

Defendant.

JUDGE MILES
CASE NO. 1:98-CV-769

Videotape deposition of *JOHN A. DAVIS, JR., M.D.*, taken as if upon direct examination before Sandra L. Mazzola, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of MetroHealth Medical Center, 2500 MetroHealth Drive, Cleveland, Ohio, at 3:05 p.m. on Monday, February 14, 2000, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

[2] APPEARANCES:

J. Kelly Carley, Esq.
The Jaques Admiralty Law Firm, P.C.
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080,

On behalf of the Plaintiff;

Patrick J. Cullinan, Esq.
Belgrade and O'Donnell, P.C.
311 S. Wacker Dr., Ste. 2770
Chicago, Illinois 60606
(312) 360-9500,

On behalf of the Defendant.

ALSO PRESENT:

Barry Hersch, Videotape Technician

[3] *JOHN A. DAVIS, JR., M.D.*, of lawful age, called by the Plaintiff for the purpose of direct examination, as provided by the Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, deposed and said as follows:

DIRECT EXAMINATION OF JOHN A. DAVIS, JR., M.D.,

BY MR. CARLEY:

MR. CARLEY: Let the record reflect that this is the video de bene esse deposition of Dr. John A. Davis, Jr. being taken in the Gene Rutherford vs. Lake Michigan Contractors case.

Q. Dr. Davis, my name is Kelly Carley, and I represent Gene Rutherford in a cause of action against Lake Michigan Contractors. I'm going to be asking you some

questions today. If you don't understand a question or would like me to repeat or rephrase it, I'd be happy to do. Just ask.

Could you give me your full name, please?

A. John Allen Davis, Jr.

Q. Dr. Davis, what is your business address?

A. 2500 MetroHealth Drive, Cleveland, Ohio 44109.

Q. And your profession?

A. I'm an orthopedic spine surgeon.

[4] Q. Dr. Davis, could you give us your educational background starting with undergraduate studies?

A. Yes. I attended Northeast Louisiana University from 1971 to 1975. I then attended Louisiana State School of Dentistry from 1975 to 1979. I practiced full-time dentistry – I'm sorry. Let me start over again.

I attended Northeast Louisiana School of Dentistry – I mean Northeast Louisiana University from 1975 to 1979. It gets a little confusing. I then attended Louisiana State University School of Dentistry from 1979 to 1983. I practiced full-time dentistry for a year.

Then I returned to medical school and I attended Louisiana State University School of Medicine from 1984 to 1988. I then participated in an orthopedic surgery residency at Louisiana State University at Charity Hospital from 1988 to 1993. I then did a spine surgery fellowship at Case Western Reserve University under the direction of Dr. Henry Bohlman from 1993 to 1994.

I then took a full-time academic position at Case Western Reserve University Department of [5] Orthopaedics in July of 1994 and have been with them presently.

Q. Okay. Doctor, could you explain briefly the specialty of orthopedic surgery to the jury?

A. Orthopedic surgery is the study of pathology involving the bones, joints and spines. It's an musculoskeletal evaluation or study.

Q. Okay. And I believe – well, let me ask you this. Doctor, are you Board-certified?

A. Yes.

Q. What is Board certification?

A. Board certification for different specialties is slightly different, but for orthopedics it involves a two-test process.

The first test is a written examination which follows the five years of orthopedic surgery residency. Once you pass that written evaluation, you then practice for 22 months.

The oral evaluation then follows the written evaluation after 22 months of practice, and what that oral evaluation does is it evaluates six months of your practice by a case-by-case evaluation. And then you present 15 cases to board members in an oral presentation form.

To be Board-certified you have to pass both [6] part 1 and part 2, the written followed by the oral portion of the Board exam.

Q. Okay. Doctor, are there certain subareas or subspecialities in orthopedic surgery?

A. Yes.

Q. Okay. Do you practice in a subarea?

A. Yes. My specialty is spine.

Q. Okay. Doctor, and you've told us that you went through a fellowship, an orthopedic spine fellowship. What is that?

A. That's an additional year of spine surgery training that is focused on the study and treatment of the pathology of the spine.

Q. Okay. And I believe you also told us that you continue to have an academic title, is that correct?

A. Yes.

Q. Okay. What is that again?

A. I'm an assistant professor and I'm the chief of the spine surgery service at MetroHealth Medical Center, the Level 1 Trauma Center in Cleveland.

Q. Okay. Doctor, do you know a Gene Rutherford?

A. Yes, I do.

Q. Okay. And he is your patient, correct?

A. He is.

[7] Q. Okay. Could you tell the jury how you came to treat Mr. Rutherford?

A. Well, I initially saw Gene on 11-20-97. At that time he was a referral to me by Dr. Tim Ward from one of

the staff clinics for an evaluation of an L4-L5 disk herniation.

He had presented the following history in that he had injured his back on 8-20-97 while he was picking up some fairly heavy cable in a tugboat. He told me that he felt a pull in his back at the time and since that time he had had constant left lower back pain with some radiating left leg pain.

It had seemed to progress to weakness to his left leg and involved his foot with numbness to his foot. He also had pain with any increasing abdominal pressure and pain with any forward flexion or extension of his back. He seemed to get some relief with change of positions. Sitting seemed to be fairly comfortable for him, but he was unable to sit for any long periods of time. He could only walk about half a mile – I mean half a block secondary to his pain. He was able to control his bowel and bladder.

He didn't seem to have any other history of [8] previous back pain or problems that were significant. I believe he related to me that he at one time about ten or fifteen years previously had had a back strain, but that had cleared up and he hadn't had a problem with it since.

He had been involved in therapy for about one and a half months at the time that he had seen me and he was going twice a week. That seemed to help him somewhat.

He had also undergone an MRI scan at MetroHealth Hospital and was diagnosed with this stated disk herniation between the fourth and fifth vertebrae.

Q. Doctor, let me stop you right there for a second. What is an MRI?

A. An MRI is a magnetic resonance imaging study, which is a study which is mainly a soft tissue imaging study that doesn't involve radiation but allows us to see soft tissues fairly accurately in the body.

Q. Okay. Also there had been a CAT scan done in New York?

A. That's correct.

Q. Okay. Were you able to review these studies?

A. The MRI scan I was. But I don't recall seeing [9] the CT scan from New York.

Q. Okay. What did the MRI show?

A. The MRI indicated a disk herniation at the L4-5 level. I have that up, if you would like to review it.

Q. Okay. Sure, doctor. Could you show us what that is?

VIDEOTAPE TECHNICIAN: Off the record.

(Thereupon, a discussion was had off the record.)

VIDEOTAPE TECHNICIAN: Back on the record.

A. This is the MRI of Gene, and it's dated 11-7-97. So this was before his surgery date. I put up two views. This first view is the sagittal plane view and this is the axial plane view.

Now, what that means in the sagittal plane is that the patient is lying flat on his back and the camera orients

itself so that it takes longitudinal sections through the body. It typically begins on the – excuse me – on the right side of the body, goes through the midline [10] portion of the body and then goes through the left side of the body. So as we look at this, these are all longitudinal sections of Gene's spine.

Now, what it reveals is that it has a large disk herniation between the fourth and fifth vertebral body that's protruding back into the spinal canal and causing significant spinal canal stenosis. Now, stenosis is just a very broad term for narrowing. It simply means that the space available for the nerves has become very narrow. So as we look at this, the two things that he has on here on the MRI is a disk herniation at the L4-5 level.

Now, in addition to that there is some bone change that occurs above and below the disk. That bone change is edema or swelling. So that's a bone reaction to the fact that the disks isn't doing a good job of support any longer. And that's part of the disk's responsibility, particularly in the very low portion of the lumbar spine.

So as we look at this, it's the tailbone or the sacrum, the fifth lumbar vertebrae, the fourth, the third, the second and the first. So [11] between 4 and 5 he's herniated a disk, and in addition to that, he has some bone changes that go along with the lack of support that that disk provides now that it's herniated. Now, these are the sagittal views.

These other views are called axial views, and what that means is as again the patient is lying flat on his back, the camera reorients itself and it takes cross-sectional views instead of longitudinal views. So the camera

changes. It takes these cross-sectional views. It then rolls them up on the screen so that in each block the top of the block is toward the abdomen. The bottom is toward the back. This side over here is toward the right side of the spine and this is toward the left side. So in reality it's like we're looking at the section from his feet up.

Now, as we look at these sections, there is a scout film that tells us where each section is from. So it starts up at the top of the spine and then it's going to work its way down to the tailbone.

So as we look at this, this little circle in the center is the actual nerve sac. Now, down in the lumbar spine we don't have spinal cord any [12] longer. The spinal cord ends typically at the first lumbar vertebra. Past that level you have a collection of a sac of nerve roots that float around in fluid called cerebral spinal fluid. It's really like water. So you have all of these nerves floating around in this contained sac of water like a bunch of wet spaghetti noodles just kind of floating around.

So what we'll see here is this sac with these little black dots, which are the nerve roots as they're floating around in this sac. Now, as we work our way down here to the 4-5 level between the fourth and the fifth vertebrae, we see a very large disk herniation which is virtually obliterating the space for the sac. It's more right-sided than it is left-sided, but it goes across the midline and involves just about the entire area of the canal.

And so this was Gene's situation when he came in to see me.

VIDEOTAPE TECHNICIAN: Off the record.

(Thereupon, a discussion was had off the record.)

[13] VIDEOTAPE TECHNICIAN: Back on.

A. Now, what I have here is a model of the lumbar spine, and as we look at it, you can count the five lumbar vertebrae. This is the fifth vertebra, the fourth, the third, the second, the first. This is the 12th thoracic vertebra and it has a little rib coming from it.

Now, as we look at this, there are individual disk spaces between each vertebra. Gene's problem was occurring between the fourth and the fifth vertebrae at this disk space. Now, this yellow structure in the back represents the nerve sac itself, and these little yellow structures emanating from the side, the actual nerve roots.

So between the fourth and the fifth vertebrae Gene had herniated a disk and it was compressing the root on the right side. So over here a disk herniation compressing the root as the fifth root was going over this area and out the side of the spine.

Q. Dr. Davis, how would you characterize the herniation at the L4-L5 level?

A. As a large disk herniation.

[14] Q. Okay. Now, Mr. Rutherford had already gone through some conservative therapy?

A. Yes.

Q. Okay. What is that?

A. Well, I guess you should call it either operative or nonoperative treatment because even surgery can sometimes be conservative therapy, but in regard to this,

nonoperative or conservative treatment includes things like oral medications, injectable medications, physical therapy. He had already been through a month and a half of physical therapy and not had any real significant relief of his symptoms. It had helped him somewhat but nothing really significant.

Q. Okay. Doctor, was the L4-L5 disk herniation that you saw on the MRI study consistent with the type of injury that Mr. Rutherford described that happened to him on August 20, 1997?

A. Yes.

Q. What was your plan at the time of this first visit?

A. Well, at the time of the first visit I simply reviewed the MRI scan with him, and at that time we discussed several things. First, the findings on the MRI, as well as potential things that were [15] down the line for him. We also talked about surgery, and I felt that the most opportune treatment or the best treatment for him at that time was a diskectomy at L4-5.

Q. Doctor, could you describe for the jury what a diskectomy is? Diskectomy?

A. Yes. And I'll refer back to the model. A diskectomy simply means removing a portion of the disk that has herniated inside the spine canal. Now, that can be done several different ways, but the most common way is probably by either a laminectomy or a laminotomy.

A laminectomy involves of the removal of this roof of the spine so that you can clearly see the nerve sac and clearly visualize the disk below. A laminotomy involves just a portion or a small removal of the bone, still able to

get the disk, but traditionally is reserved for disk fragments that are fairly small and are very localized.

Q. When was the next time you saw Mr. Rutherford, doctor?

A. On the date of surgery.

Q. Okay. And when did that happen?

A. On 1-6-98.

[16] Q. Okay. Now, you've explained in general terms what occurs with regard to the diskectomy. What do you actually do at that time? Where is the incision made and what instruments do you use and how do you do it?

A. Well, the incision for a lumbar diskectomy is obviously based on the level, and in Gene's case it was at the 4-5 level, which is right about the level of the pelvic crest. So his incision traveled several centimeters above the level of the crest to several centimeters below the level of the crest. It's in the midline of the back.

And once we do that, we incise through an area called the lumbar fascia, and then we spread the spinal muscles, because on either side of the spine there are groups of muscles that lie in this gutter. So these muscles are separated from the spine and the spine's exposed. We use a various number of instruments to get through the bone. One is called a Leksell rongeur which resects out a portion of the bone. And the other ones are called Kerrison rongeurs which are smaller instruments to help remove bone.

And in Gene's case we took the roof, we did a complete laminectomy of the L4 vertebral body. [17] So we removed the whole roof of the spine. And the reason we did that was because the disk was large, it went from the right side across the midline to a portion on the left side, and we wanted to be able to get to the disk from both the right and the left side safely. So we took the roof off the spine.

And once we did that, we mobilized the nerve sac; in other words, we could gently push the nerve sac away from the disk herniation. And then we would use a 15 blade scalpel, which is a small scalpel blade, and we would cut a perimeter of the disk in the back. Then we would remove that disk with some grabbers called pituitary rongeurs. Now, that is done really on both sides. So we went from both the right and the left side to do that for Gene.

And once we were done, we then evaluate the nerve roots for mobility to see if they're able to move and if there's freedom from compression. Once we determine that there is, then we wash everything out well and then we close up the deep muscle layer and the superficial fascia layer and then the skin layer. And that's what Gene had.

Now, we use a special table for that called [18] a Jackson table, and it's a nice table because it suspends the patient's head without any pressure on his face. So during the course of the surgery there's never any pressure on his eyes or his nose or his face. And it involves the placement of Gardner-Wells tongs, which are tongs that

attach to the skull and then are able to suspend the head and the face without any pressure.

You may ask why that's important. Because any pressure on the eyes for any prolonged period of time can cause blindness. So it's a safety, a special spine table that we utilize at Metro.

Q. Okay. What type of recovery time can one expect after a L4-L5 diskectomy such as the type that was performed on Mr. Rutherford?

A. Well, in the long-term probably six, eight weeks worth of recovery time. It's usually a few days in the hospital. Sometimes less than that. Then he walks for exercise for about three weeks, three to four weeks, and then we usually get him involved in an aquatic therapy program followed by a land-based program.

Q. Okay. And doctor, do you have there how long Gene was in the hospital for?

A. I don't.

[19] Q. Okay. How long does it usually take? What's the hospital stay?

A. Usually a couple of days.

Q. And when was the next time you saw Mr. Rutherford?

A. I saw him on 1-26-98, and he was returning for his three-week post-op visit at that time.

Q. Okay. Did you evaluate him at that time?

A. Yes.

Q. And what did your exam and evaluation show?

A. Well, by history he told me that he was doing well. He stated that he had no more leg pain. He was walking, and on prolonged walks he occasionally would get some tingling in his legs but he felt that that was minimal. His back incision was well-healed. His lower extremity strength was normal. His reflexes were good bilaterally, which means both on the right and the left side. Straight leg raising was negative bilaterally.

He even talked to me on that date about potentially going back to work, but I told him that I would like for him to participate in an aquatic therapy program and I gave him a prescription for that on that visit. I also told [20] him that I would like to progress him to a land-based program and a home exercise program.

And then I asked for him to return to see me on February the 26th for a follow-up.

Q. Okay. Doctor, before we go to that visit, let me ask you, what does a herniated disk at the L4-L5 level, a large herniated disk, and the surgical procedures that were performed on Mr. Rutherford do to the spine, the dynamic of the spine?

A. Well, that's kind of a difficult question, but I think that – that you can imagine that each segment has its own responsibility as far as support, and bio-mechanically, that's very important, particularly in the two lower lumbar disk levels at L4-5 and L5-S1.

Now, the critical thing is, and again, I'm going to refer to the model here, if you look at the L5-S1 disk, the two most common levels for disk herniation are at L4-5

and L5-S1. Now, at L5-S1 though it's within the pelvis, and by that I mean that this disk level is typically beneath the pelvic crest. Now, there are some ligaments called iliolumbar ligaments, and those ligaments run from the pelvic area to this transverse process of this fifth vertebra. Now, you may ask [21] well, why is that relevant. Because if you herniated a disk at L5-S1 and you go in and you do a diskectomy, that level is inherently more stable. In other words, it has support from other structures.

The 4-5 disk, on the other hand, is a bad disk to herniate because once you herniate that disk, that disk space level is theoretically out of the pelvis. It doesn't have those stabilizing structures. So biomechanically, things change when you lose the support at the L4-5 level. Instability begins to become a much larger factor.

Now, as this instability or stress builds up in this lower level, the other levels tend to compensate. So at 3-4 and 5-1 those segments take on an added load. And they start to try to compensate for lack of motion at this other level, at 4-5. So as time goes along, typically the joints in the back between the third and fourth vertebrae and between the fifth vertebra and the tailbone, they tend to enlarge because as they take on added stress, they try to distribute that stress by making themselves larger. It's like anything does. Like in a knee, for [22] instance, with arthritis, it will try to make itself bigger if it's bearing weight abnormally.

So as the bone – as the bone joint makes itself larger, it tends to grow into the space for the nerve so it creates stenosis often at the levels above and below a disk herniation or a change in biomechanics within the spine.

Q. Doctor, with regard to your February 26, 1998 visit, what occurred at that time?

A. Well, he returned for an evaluation. He seemed to be doing well. He was requesting at that time that he return to work. He had been undergoing the aquatic therapy program and the physical therapy land-based program and had seemed to have done well with that.

I found his physical exam to be essentially normal. His reflexes were normal. His muscle strength normal, negative straight leg raising. His sensation was intact, and I felt that his gait appeared fairly normal also. So I gave him a note that stated that he could return to work on March the 2nd, and I asked him to follow up with me in May or June of that year.

Q. Okay. Were there any restrictions given to him at that time?

[23] A. Yes. I believe I asked him to restrict his weightlifting to about 20 to 25 pounds, which I typically do for lumbar disk herniations.

Q. Okay. Now, doctor, when was the next time you saw him?

A. I saw him on May the 7th, 1998.

Q. And what occurred on that date?

A. Again, he returned telling me that he was doing well. He had some minimal back pain. He got some occasional leg cramping. But he was working a very physical job at seven days a week and twelve hours a day at that time.

Again, I found his gait to be normal. His incision was well healed. He showed excellent forward flexion and extension. I didn't seem to elicit any pain when I palpated his back or pushed on his back. His lower extremities showed a normal range of motion. His straight leg raising was negative. His muscle strength was normal. So an intact, normal physical exam.

I felt that since overall he seemed to be doing well, that he could return to see me in August or September. We had talked about some other things in regard to his situation. But I felt that overall, you know, to see him August or [24] September were probably good dates for him to return.

Q. Okay. And when did you next see him?

A. Well, I actually heard from him. He called. We received a phone call from him on 7-1-98.

Q. Okay.

A. And at that time my nurse took the message and just kind of wrote down the items, but she stated that while at work in Michigan on 6-23-98 he was lifting a railroad tie with another person. He was wearing a weightlifter's belt, but he developed the acute onset of midline low back pain. He continued to work at that time but found that he was having increasing difficulties.

So he went home to Cleveland and had not returned to work and he told my nurse that he was simply, quote, lying around, end quote, due to the pain. He had taken some ibuprofen, but again, the pain was fairly constant and he graded it on a scale of 5 out of 10. He didn't seem to have any leg pain at that point but did have some

tingling to his left foot. He didn't seem to have any numbness or bowel or bladder difficulty.

[25] Maryann, my nurse, discussed this with me, and we recommended that he put ice on his back and take some Naprosyn and Flexeril, and we thought that it might be wise for him to see one of the physical medicine and rehab physicians for an evaluation. We set him up with an appointment for that on August 6.

Q. Now, doctor, I believe you said that after you do have a herniation like Mr. Rutherford suffered at the L4-5 level and the subsequent surgeries, the back is weaker, is that correct?

A. It is. Biomechanically it's never the same. Once it has a disk herniated, it never quite behaves normally and it probably is set up for some further injury.

Q. Okay. And that apparently occurred, at least to some extent, in August, correct?

A. Yes.

Q. Okay. Doctor, in that 8-6-98 note I note that you state that he does have advanced degenerative disk disease at the L4-L5 level with some mild degenerative at the L3-4 and L5-S1 levels. What do you mean by that?

A. Well, when he returned in August we x-rayed him and x-rayed him in the flexion-extension lateral [26] view, and this is where we saw a lot of this – these changes going on in Gene's back. He had degenerative disk disease, which was significant between the fourth and fifth vertebral body.

Now, that really makes sense when you think about it. If you herniate a large portion of disk and it's back in the spine canal, it's not going to leave you a lot of support between the two vertebral bodies. And as time seems to go along, there is narrowing of the disk space that starts of occur. And that's what Gene was experiencing, some narrowing as well as bone spur formation.

Now, at the levels above and below, again, he is taking on a little more load than he should be taking at those levels, and those levels are responding to that load by some joint arthritis and some disk degeneration at those segments also.

Q. So when you say there was degenerative disease or disk disease, that all stems from the original injury at the L4-L5 level?

A. Yes.

Q. Okay. Doctor, it looks like you also recommended some potential treatment on the August 6, '98 [27] visit. What was that?

A. Well, my thought was that I might lessen some of his back pain, since he didn't have really dramatic leg complaints, by doing facet joint injections in the lumbar spine. Now, facet joint injections are similar to an injection of steroid in a bad knee joint.

So if somebody has a bad knee, arthritic knee, you put a little steroid in there and often their symptoms get a lot better. Well, you can do the same in the back. And if you look at this from the back, these facet joints have areas that you can enter in with a small needle and you can deposit a little steroid within them.

So the goal of the treatment is not the change the basic pathological process that's going on, just as the steroid in the knee doesn't do that. It is just to decrease the inflammation within the joint itself.

So that's what I recommended to Gene was facet joint injections under fluoroscopic image, which means that they're done in the x-ray suite utilizing an x-ray machine so that you can see exactly where you need to be.

Q. Okay. And you continued to have Mr. Rutherford [28] on restrictions at that time, is that correct?

A. Yes, I did.

Q. Okay. And that was what?

A. Again, limited weightlifting, less than 20, 25 pounds.

Q. Okay. When did you next see Mr. Rutherford?

A. Well, I did the facet joint injection on him on 10-29-98 and then he returned to see me on 2-18-98.

Q. And what happened on that date?

A. Well, again, he had –

Q. Let me strike that, doctor. Again, you did the facet joint injection on 10-29-98?

A. Yes.

Q. Okay. And that was what you had – what you'd explained to us before?

A. Right.

Q. Okay. And is the patient under anesthesia at that time?

A. No. Other than local anesthetic. In other words, I put a little numbing medicine in the skin, but he's not under general anesthetic.

Q. Okay. And then you next saw him on 2-18-99?

A. Right.

Q. Okay. What occurred on that date?

[29] A. Well, on that date he informed me that he had recently taken a new job at a machine shop and it didn't involve any heavy lifting. He seemed to be doing well with this, but occasionally he was getting some shooting pains, particularly to his left leg from his back. This left leg pain was fairly new, and I was concerned about it.

On physical exam he still seemed to have a fairly good range of motion of both his hips and knees, and his sensation was intact as well as his reflexes being normal. He had no pathologic reflexes. There were no signs of any muscle atrophy and no changes in his skin, such as swelling or skin rashes.

I decided to use a little Neurontin, which is a nerve medication, to attempt to decrease some of his leg pain, and I gave him a prescription at that time for 90 tablets. They're 100 milligrams. And I asked him to take one three times a day. I talked about the risks of the medication also.

I also rereviewed his x-rays, and I talked to him about abnormal translation or angulation in the form of instability. But I didn't see any of that. I also mentioned that him the [30] possibility of reimaging his back at that time because the leg pain was concerning to me. And by

that I mean a repeat MRI scan or a myelogram and CAT scan.

Q. Okay. Doctor, up until the time of that visit, the 2-18-99 visit, had you been prescribing pain medications for him also?

A. Yes, some medications, particularly in the form of antiinflammatory medications, some low dose narcotic medications.

Q. Okay. When did you next see Mr. Rutherford?

A. Well, after 2-18 he returned to see me on 6-17-99.

Q. And what occurred on that visit?

A. Well, again, overall he was doing fairly well, but he was still having some back pain, some left leg pain. He was continuing to work but that seemed to be aggravating his pain. It was mostly aggravated by driving back and forth from the Cleveland area to the Michigan area.

His lower extremities again showed a full range of motion and normal muscle strength. His reflexes were normal. So on physical exam he hadn't changed dramatically. His sensation was still intact.

[31] I felt though that overall he had significant disk degeneration and I told him that we should consider repeating either an MRI scan also consider epidural steroids and maybe even a myelogram or CAT scan at that time.

Q. Doctor, I think you said on the June 7th visit that you think overall he has a disk degeneration and this was what was giving him most of his pain. Again, that disk

degeneration was caused by the original herniation at L4-L5?

A. Yes.

Q. When did you next see Mr. Rutherford?

A. He came back to see me on July 22, 1999. And at that time he was having worse leg pain, particularly to the right leg. He had some residual left leg numbness, but his right leg seemed to be much more painful. His back was also painful, particularly in the paraspinal area and down the buttock area.

On my physical exam I actually found him to be weak on that visit, particularly weakness to his hamstring and his gluteal medial muscle which I graded as 4 over 5. That's typically the fifth nerve root being involved. His reflexes were still normal. He had no pathologic reflexes. [32] His straight leg raising seemed to be give him pain on the right as opposed to where he had been – the straight leg raising had been negative before.

So no x-rays were taken that day but I felt that since he had had this new onset of more severe right leg symptoms and this was worsening for him, that we should – that should undergo a lumbar myelogram and a CAT scan for evaluation.

Q. Doctor, you mention in your July 22, '99 note that he had undergone an EMG nerve conduction study. What is that?

A. That is in essence a needle evaluation where needles are placed at certain points in the lower extremities and current is passed from one needle to the next.

That demonstrates both speed or velocity of nerve conduction as well as muscle irritation or muscle dysfunction.

So on his EMG nerve conduction study he showed some chronic S1 radiculopathy on the left side.

Q. And what is that?

A. Well, that just means some chronic first sacral nerve root irritation.

Q. Okay. Is that consistent with the spine problems [33] that he was having?

A. Yes.

Q. Okay. Doctor, when do you next see Mr. Rutherford?

A. He returned to see me on 9-23-99. At that time he had recently had his lumbar myelogram and post myelogram CAT scan. That study indicated fairly severe stenosis at the L3-4 level. I felt at that time that most of that was the result of some of the biomechanic changes in his spine at L4-5.

So we talked about the options for him at this time in regard to the results of this myelo CT.

Q. Doctor, let me just ask you again, now, what is a lumbar myelogram?

A. A lumbar myelogram is the injection of dye in the lumbar spine, and as that dye fills up the nerve sac and flows down the sac, x-ray pictures are then taken. The test is then followed by a CAT scan, which is really

kind of where the money is on a myelo CT. It kind of clearly defines and quantitates stenosis very well.

I have that study up, if you would like to take a look at it.

[34] Q. Why don't we take a look at it, doctor, sure.

A. Okay.

VIDEOTAPE TECHNICIAN: Off the record.

(Thereupon, a discussion was had off the record.)

VIDEOTAPE TECHNICIAN: Back on the record.

Q. Okay. Doctor, those are the CAT scans?

A. These first two pictures are the myelogram portion of the study. And this white line here is the dye and it's introduced from the back with a needle and injected into the nerve sac. Then the dye flows up and down, and pictures are taken with the dye in place.

Now, what we can see here as we're looking at Gene's spine from the side, so this picture is like he's standing here looking this way, we're looking at him from the left side. This is the tailbone or the sacrum, the fifth vertebra, the fourth, third, second and first.

The flow of the dye comes down nicely until it gets to the 3-4 level. At that level it thins [35] out fairly dramatically. Then in addition to that, there is a large bump in the dye between the fourth and the fifth vertebrae so that the

dye column is really deviated posteriorly or shifted posteriorly at that 4-5 level. And then it continues through the tailbone.

Now, these are two pictures with the dye in place also, and you can see that the flow of the dye comes down. These two pictures of the spine are with Gene rotated slightly. So here's the flow of the dye. It's virtually obliterated here between the third and fourth vertebrae, and then there is a large section of the dye that doesn't flow between the 4-5 vertebrae on the right side. Again we see it here. The dye flows down, it's narrowed, and then part of it is missing between the fourth and the fifth vertebrae.

Now, like I said, where the money is on this test is really the CAT scan. So once the dye is in place, the patient is placed flat on his back and put in the CT scanner. The CT scanner, again, this looks like a million cuts, but it's done in transverse section and then these sections are rolled up on the screen. So again, that in each big block the top of the block is [36] toward the abdomen. The back is toward his back. This is the right side and this is the left.

Now, this is the upper portion of the lumbar spine, so this is the disk between the second and third vertebrae. So as we come through this area, we can see the dye in the nerve sac here. Now, these little back dots inside are the nerve roots again floating around in this contained sac of dye. And this look pretty up here until we got to the 3-4 disk space and at that level the dye column flattens pretty dramatically. Now, that's a combination of

disk protrusion and joint enlargement that's causing some narrowing for that dye sac.

Now, as we get to the fourth level, we see the fourth vertebral body here. We'll pick it back up right over here. We can see that as we come down between the 4-5 level there is a large disk protrusion right here with a recurrent herniation that seems to be cutting off the nerve root.

Now, as we look at that and we get past that level, we see that the nerve sac really opens nicely. So the rest of the way through here he [37] looks fairly good with the exception of some disk bulging at 5-1 and some joint enlargement at 5-1 which narrows the space for the nerves, too.

So I think that both of those really kind of come from the fact that biomechanically he's changed significantly at 4-5, and these other levels are taking on a little added stress and these joints are getting a little large, and as they do, they're growing into the space for the nerves.

VIDEOTAPE TECHNICIAN: Off the record.

(Thereupon, a discussion was had off the record.)

VIDEOTAPE TECHNICIAN: Back on the record.

Q. Doctor, so what we we're seeing now is some problem occurring to L3 and L4, correct?

A. That's correct.

Q. Okay. And that is right above the disk area where he had the original injury, correct?

A. That's correct.

Q. Okay. And you're also seeing a problem now at [38] L5-S1, is that correct?

A. That's correct.

Q. And that is directly below the disk area that he had the original injury on?

A. Yes.

Q. Okay. And is that what you're saying, that biomechanics now stemming from the original injury are affecting the disks both above and below the original injury area?

A. Yes.

Q. Okay. When was the next time you saw him? Well, let me ask you this, doctor. Did you – you apparently had tried the Neurontin, is that correct?

A. I did.

Q. Okay. And was that helping?

A. No. It didn't give him too much relief.

Q. Okay. Also epidural steroids were also tried?

A. Yes.

Q. Okay. Did that help him?

A. Not significantly. I think he had a little bit of relief with it but not much.

Q. Okay. What was your recommendation at this time in September of 1999?

A. Well, I felt that more than likely he was going [39] to need a revision lumbar decompression and instrumented fusion.

Q. Okay. Can you explain to the jury what that is?

A. Yes. By revision I mean a repeat surgery. It would involve the removal of the fifth lamina, the removal of the third lamina, and in addition, a removal of scar tissue at the level of the fourth lamina, which is gone now.

So this is space, but you would have to revisit the nerve roots at this level and remove any scar and disk – the recurrent disk herniation that's occurred at that level. So once you do that, that's the decompressive portion of the procedure.

The fusion portion of the procedure is a stabilization and that is done utilizing rods and screws. Now, we tend to use pedicle screws which are screws that go through these columns of bone that connect the root to the body of the vertebra. So the screw goes down through inside this column of bone into the body of the vertebra. So that would involve a screw at the third, fourth and fifth level and potentially at the sacral level depending on the amount of bone resecting that would need to be done. So once [40] you put these screws in place, you connect those screws with a rod.

Now, in addition to that, bone is harvested from back here, from the pelvis through the same skin incision, and bone is placed along these transverse processes to grow

together and form the fusion. So the rods and the screws simply act as an internal splint. They provide instant stability. But the long-term stability comes from bone growth and the bone growing on either side of the spine.

Q. Okay. Is the hardware left in forever?

A. Traditionally, yes.

Q. Okay. Does the spine lose some mobility when you have a fusion procedure such as the – such as the one you described?

A. Definitely.

Q. Okay.

A. I tell every patient that in reality fusion is a nonphysiologic process; that every segment should have some motion to it; it was made to move, and in a certain way; that fusion itself stiffens or creates stiffness to the spine. But in some situations it's a very good procedure. It's about the best thing we have in the year 2000 for [41] severe disk degeneration and instability.

Q. Okay. So you're not trying to replicate the original uninjured spine. What you are trying to do is just create certain stability, correct?

A. That's correct.

Q. Okay. Doctor, you have a September 27, 1999 letter, is that correct, to –

A. Yes, that's correct.

Q. Okay. In that letter you describe the problem that we've just gone over with both the L4-L5 – I mean the L3-L4 region and the L5-S1 region?

A. Yes.

Q. And what do you state with regard to those problems?

A. Well, that I felt that his studies indicated that he had a significant amount of stenosis at the L3-4 level and a recurrent disk herniation at L4-5 and some epidural scarring which I felt was fairly significant. I also felt that he had a disk bulge at L5-S1. I felt that the worsening of the stenosis above this segment was due to the fact that he had undergone a diskectomy and laminectomy at L4-5 and that these segments had to work harder to compensate for biomechanical change within the spine. So as a result I felt [42] that he was going to need a laminectomy at L3 and L5 with a thorough decompression of his nerve roots and possible fusion.

Q. Doctor, did you have an opinion what these problems were stemming from?

A. Yes.

Q. Okay. What was that?

A. I felt that it was related to his work-related injury and his disk herniation at L4-5.

Q. Was Mr. Rutherford or is Mr. Rutherford agreeable to undergo this operative procedure?

A. Yes.

Q. Okay. Has he had the operative procedure yet?

A. No.

Q. Okay. Doctor, when was the next time you saw him?

A. I saw him on 1-27 of the 2000, so January 27.

Q. And what occurred at that time?

A. Again, he described to me that his leg symptoms were increasing, particularly with burning and pain. He had low back pain. He had difficulty arising from a seated position.

Again, we rereviewed the lumbar myelogram and the CAT scan and we talked about what it showed. We had a long discussion regarding the [43] surgical intervention and again, similar to what I just described to you. I felt that he continued to show some weakness, particularly in his hamstrings, his hip abductors and his tibialis anterior, which is the muscle responsible for elevating the foot. All of those I felt were slightly weak at 4 plus over 5 which is the grading scale that we have for muscle evaluation.

I felt his reflexes were normal. He showed no pathologic reflexes. I felt that overall he would improve from the surgery and that we needed to progress with a L3 to the sacrum decompression and possible fusion.

Q. Okay. And that was the last time you saw Mr. Rutherford, doctor?

A. Yes.

Q. He is currently unable to do any heavy lifting, correct?

A. Right. I would rather him stay away from that currently, you're right.

Q. Okay. And is he on a restriction now?

A. Yes, I believe.

Q. Okay. What is that?

A. I think it's 20 to 25 pounds.

[44] Q. Okay. Now, if Mr. Rutherford has this sacrum decompression and the fusion with the hardware, will he be able to do heavy lifting?

A. Traditionally, no. I do have patients that go back to really physical labor after fusions, but I don't think it's a great idea. I think that people who have longer span fusions, particularly younger people, need to be very careful with that and should protect it. So idealistically some vocational rehab would probably be the best thing for him.

Q. Okay. You would not – you would continue to keep him on restrictions, correct?

A. I would.

Q. And again what would that be?

A. Well, I would restrict his weight lifting probably again to about 20 pounds and then I would make some suggestion that frequent changes in position be allowed for him such as short-term sitting, short-term standing, short-term driving or being seated in a vehicle.

Q. Okay. Doctor, I'd like to ask you a couple opinions questions if I could. Can you state within a reasonable degree of medical certainty – and I know you've gone over your records [45] quite thoroughly with us – do you believe that the back problems for which you've treated Mr. Rutherford since November 20, 1997 are the result of the work-related injury he sustained while at work on the tugboat on August 20, 1997?

A. Yes.

Q. Okay. And do you believe this new surgery that you're recommending, the decompression and the spinal fusion with hardware, within a reasonable degree of medical certainty, is this new surgery necessary due to the original injury he suffered on August 20, 1997?

A. Yes.

Q. Okay. With regard to the – again within a reasonable degree of medical certainty, do you believe the pain that Mr. Rutherford has suffered over the last – or at least since you've treated him, since November 20, 1997, was also caused by his work-related injury on August 20, 1997?

MR. CULLINAN: Object to the form of the question. It's leading.

A. Yes.

Q. Well, let me ask you this. What do you believe was the original basis for the pain that you've treated Mr. Rutherford for over the last two and [46] a half years?

A. His L4-5 disk herniation.

Q. And what do you believe caused the L4-5 disk herniation?

A. His work-related accident.

Q. Okay. Also, all the medications that you have prescribed for Mr. Rutherford since November 20, 1997, do you believe within a reasonable degree of medical certainty that they are also related and caused by the original work injury?

A. Yes.

Q. Okay. Doctor, what is congenital stenosis?

A. Well, again, stenosis means narrowing. Congenital stenosis in regard to the spinal canal is some narrowing of the spinal canal that people are born with. There are some structures that some people have that make their spinal canal a little bit smaller than normal.

If I can refer back to the model, this column of bone right here called the pedicle, sometimes people can have a little shorter pedicle than normal and have some element of congenital stenosis. In other words, that makes roof a little closer to the vertebral body itself so that narrows the front-to-back diameter of the [47] spinal canal.

Q. Does Mr. Rutherford have some congenital stenosis?

A. He does have an element of congenital stenosis, yes.

Q. Okay. If you just had congenital stenosis, can a person stay asymptomatic, meaning no back problems, his entire life?

A. Sure.

Q. Okay. Do you believe the congenital stenosis in this case is what caused Mr. Rutherford's problems?

A. No.

Q. Okay. And again, that's the biomechanic changes due to the original injury that you believe is causing the problems?

A. Yes.

MR. CARLEY: That's all I have, doctor, Thank you very much.

CROSS-EXAMINATION OF JOHN A. DAVIS, JR., M.D.

BY MR. CULLINAN:

Q. Doctor, my name is Patrick Cullinan. I represent the defendant, Lake Michigan Contractors, in this case. I just have a number of questions for you [48] regarding your treatment of Mr. Rutherford.

With respect to biomechanical changes that you noted at L3-L4 and at L5-S1, how long should it have taken after the injury bringing on those symptoms for those to actually show up on radio – radiographic film?

A. Well, I think that's varied. Some people that are a little bit stronger bone formers than others may show those changes a little bit more rapidly, but I would say traditionally within about six months.

Q. Okay. Would you expect to see them, any such changes on the date when the incident occurs?

A. Well, you mean on the same date as the injury?

Q. Right.

A. No. Typically, not.

Q. Okay. If there were other radiographic findings such as those, would that indicate to you that there was a prior injury that resulted in those radiographic changes or ones that were noted radiographically?

A. Well, it depends on what those changes were.

Q. Okay. You mentioned that you hadn't seen any of the records from Rochester Hospital, is that correct?

[49] A. I don't recall seeing those.

Q. Do you know whether there was a CAT scan of the lumbosacral spine taken of Mr. Rutherford on August the 20th of this '97?

A. I know that there was only because he told me that he had a CT scan in New York. But I don't believe I ever saw it.

Q. Okay. I just have the one copy of that if you don't mind me sliding it over to you. If you could take a look at that and after you've had a chance to look it over, just let me know.

A. Okay.

Q. Can you tell us, first of all, does that document indicate that it is a CAT scan of Mr. Rutherford taken on August 20th of '97?

A. Yes.

Q. And that's apparently the date that he claims he suffered the injury at his employment?

A. Yes.

Q. Could you tell us what those radiographic or CAT scan findings depicted?

A. The overall impression was that he had a central posterior disk herniation at L4-5, posterior disk bulge or herniation at L5-S1, and they recommended a myelogram followed by a CT scan.

[50] Q. Okay. Does it indicate that there were any degenerative changes at L3-L4?

A. Yes. At L3-4 it says mild annular bulge and mild facet joint degenerative changes without stenosis.

Q. Okay. And are those similar to the facet joint changes that you had noted at L3-L4 that you have been treating?

A. Yes, but I mean I think that those facet joint changes have increased fairly dramatically, you know, since I initially treated him. Of course, that was two and a half years ago so.

Q. Okay. But it does indicate that he was already encountering or experiencing those facet joint changes as of August 20 of '97?

A. That's what it indicates.

Q. All right. Now, he mentioned to you that he had had a prior back injury, some sort of back injury?

MR. CARLEY: I'm just going to object to the broad nature of back injury.

Q. Well, did he give you a history –

MR. CARLEY: Whether you mean spinal or muscular or –

A. I think he had said that in the past about ten or [51] fifteen years ago I think he had some lumbar sprain/strain or something like that.

Q. Okay. Do you know whether he mentioned having one or two conditions involving his back?

A. No.

Q. Okay. With respect to lumbar sprains, is there typically a recovery period? I would imagine it would vary from lumbar strain to lumbar strain, but is the recovery period typically as long as seven months?

A. You know, I don't think so. Usually what I see is if it's just a muscle injury like somebody injures a muscle like a sprain to their back, traditionally it's about six weeks to three months and they usually get much better.

Q. Okay. If someone was off work for as long as seven months with some sort of back injury, would that indicate to you that there was something other than a muscle strain at issue?

MR. CARLEY: I'm just going to object to the foundation.

A. Well, I think that you have to look for something else. Certainly, if somebody has a problem greater than three months, I always tend to look for something more acute or a greater problem.

[52] Q. Okay. Have you ever reviewed any other documents of the prior history of Mr. Rutherford relating to before August 20 of '97?

A. No.

Q. Okay. So as you sit here today you don't have any idea what those back injuries involved other than what he's told you, correct?

A. Right.

Q. With respect to the CAT scan that was done on August 20 of '97 at Rochester Hospital, it makes note of a disk bulge at L5-S1, is that correct?

A. Uh-huh.

Q. Is that the same disk bulge that you are currently treating?

A. Well, I think that yes, it could be – it could be the same disk bulge. In other words, I don't think that that disk protrusion has gotten a lot worse for him over time.

Q. Okay. Would that disk bulge have showed up immediately on the date of an incident or is that something that you mentioned earlier comes about as a biomechanical change over time?

A. Well, I think obviously on the day of the injury it's probably a low likelihood that that disk bulge was present at the same time as his injury, [53] but it wouldn't be unheard of to have two disks, you know, with some degree of injury. So I think it's really hard to predict that. You've [sic] kind of asking me if I had a crystal ball, could I say that it was or it wasn't. I don't know. I think the fact that this was done on the 20th, I don't think anybody could say that. Maybe that disk received some injury at the same time.

Q. Okay. I guess what I'm getting at then, am I correct based on what you're saying there is no way to say with any medical certainty one way or another whether that L5-S1 disk bulge was a result of the injury on the 20th or it predated that?

A. Well, I think it's difficult to say. I mean I think that – I think certainly he's loading that now and he has

some facet joint changes that are related to that – to the fact that he doesn't have good support at L4-5 now. Now, whether that disk bulge has changed much, you know, from his initial injury to now, I don't think it's – I don't think it's that significant. It's not like a big herniation.

Q. Okay. And with respect to the L3-L4 mild facet joint degenerative changes that were present on [54] August 20 of '97, can you say with any certainty whether that predated the August 20, '97 incident?

A. I would say that that more than likely predated the August 20 incident.

Q. Okay. Would that suggest to you then that the L5-S1 disk problem also predated that?

A. Well, I think the disk is a little bit different than joint arthritis. You know, if you document joint arthritis on a CT scan, that's something that takes time to form. Disk injury though can certainly be acute.

Q. Okay.

A. So I think you're mixing kind of apples and oranges with it.

Q. Is there anything else that would result in that joint degeneration that was already existent on August 20 of '97?

A. Would you repeat that?

Q. In other words, what are the types of things that could have caused that as of August 20 of '97?

A. The joint?

Q. Yes.

A. Well, certainly an injury to the joint, you know. Any kind of like extension sort of injury, [55] sometimes those can aggravate the joints fairly significantly. Typically on extension, you load the joint. So if somebody comes in and I see them and they have isolated joint arthritis that's really bad, I always kind of look for an extension mechanism injury.

So I think maybe perhaps if he had had something like that at a younger age and maybe had developed a little arthritis at that level.

Q. Okay. Now, do you have all of the MetroHealth Center records relating to Mr. Rutherford in your file?

A. You know, I don't know if I have every single thing, but I have at least the times that I've seen him and the surgery that I performed, the path report, those sorts of the [sic] things.

Q. Okay. He was seen in the emergency department, I believe, on about August 25th of '97?

A. I would not have that record. I'm sorry.

Q. Okay. Would those typically be records though that you would rely upon in your care and treatment of a patient if there were any other, for example, emergency department records predating when you're seeing him the first time by a couple months?

[56] A. Would I have those?

Q. Well, would they be something that you would rely upon?

A. Sometimes, but it just kind of depends on what he's being seen for.

Q. Okay. I just want to show you a document that – and maybe you can identify it for me even better. I believe it's an emergency department document.

A. Actually, this is a medical clinical visit. So he came to the clinic here at Metro. This is a clinic sheet. And up at the top it says 10C Medicine Group, which [sic] a medicine evaluation.

Q. Okay. Would that have been done here at Metro-Health?

A. Yes, it was. It's with our stamp.

Q. Okay. And is there any way to identify what the date of that is?

A. Yes. It's usually right up at the top. And you know what? It's washed out. It's definitely September the 11th, but I can't see the year. I don't know if it's '98 ninety –

MR. CARLEY: Mine is fairly clear.

MR. CULLINAN: I couldn't tell either.

[57] MR. CARLEY: Looks like ninety –

A. '97. 9-11-97.

Q. Okay. And in that document it appears that he gave a history to the medical staff at MetroHealth?

A. Yes.

Q. Okay. And is that history – it appears to be relating to his back symptoms, doesn't it?

A. Yes.

Q. And would that be a type of document that in the course of treating Mr. Rutherford would be one that you would rely upon?

A. Well, I hate to say anything bad about any colleagues, but the medicine group – medicine is – I mean obviously I would look at it if they called me or they had something, but from a medical standpoint as far as looking at spine, I probably wouldn't put a lot of credence into it.

Q. Well, I'm not looking so much for diagnoses or things like that, but basically as far as the patient history is concerned, does the staff typically take the history from the patient and write it down as accurately as they can?

A. I think they do that, yes.

Q. And there is a history in that document, correct?

[58] A. Yes.

Q. It's not too extensive, but can you –

A. I'm not saying anything bad about them. I'm just –

Q. I understand.

A. You know, it would be like me taking a hypertension history. I mean that's not what I do for a living. So I don't – they wouldn't take a lot [sic] credence into my hypertensive history probably. That's all.

Q. Okay. Just generally – well, specifically since it's very short, can you tell us what the history indicates Mr. Rutherford related to the nurse at that time?

A. It says 39 year old male with no prior medical history who presents with history of acute low back strain 8-27-97 while pulling a steel rope on a tugboat. Felt sharp, knife-like pain left mid, lower back with radiation towards the left leg. Backed up and sat. Called for help. Sat down with pain and went to hospital.

Q. Okay. That's fine, doctor. So it indicates that the history he gave was immediately upon feeling the onset of pain he sat down and asked for help?

A. Yes.

[59] Q. Okay. And nowhere in that document does he give a history of having felt pain at one point and then later having an additional onset of pain?

MR. CARLEY: Object to the – the document speaks for itself and it can call for speculation doctor's part, so he didn't take this note down per se at this point.

MR. CULLINAN: I'm just asking if the record indicates that in any way.

MR. CARLEY: Same objection.

A. Doesn't seem to.

Q. Okay. Now, he was seen for physical therapy for a couple months prior to seeing you, correct?

A. Yes.

Q. What generally was the purpose of that therapy?

A. Well, typically what they try to do is some abdominal and lumbar strengthening exercises to kind of help support the bad disk and in essence some pain relief modalities. So those are the two things usually.

Q. Now, the surgery was done on January 6th of '98?

A. Yes.

Q. And you had mentioned sometimes during – a couple dates. He was actually in just one – until the 7th, is that correct?

[60] A. You know, I hate to say.

Q. If I show you the discharge, does –

A. I didn't write it down, but –

Q. Does it look like he was discharged [sic] next day?

A. Yes, apparently the next day he was discharged.

Q. So there were obviously no postoperative problems that developed?

A. That's true.

Q. There was a radiopaque – is that the correct word?

A. Yes.

Q. Radiopaque done on January 6th of '98 on the date of the surgery?

A. I'm sorry. I don't understand what you're asking me.

Q. Was there – could you first tell us what a spine lumbar radiopaque is?

A. I don't know what that is.

Q. All right. Well, let me see if I can find it here.

A. I'm sorry. Maybe like a marker during surgery? A marker film? Like a metallic marker on an x-ray?

Q. Let me show you, doctor. Maybe you can explain it to me.

[61] A. Right. It's a marker film. This is a location film. In other words, we take this during surgery. We put a little radiopaque marker on the spinous process right back here in the back so that we can check our level, make sure we're at the correct level.

Q. Okay. And does that show or reveal anything in the way that a CAT scan or an MRI would or anything else?

A. Well, this is – this shows the bone and the marker, but obviously it's less informative than an MRI or a CAT scan would be.

Q. And did that reveal anything that had not been revealed in any prior MRI's or CAT scans of Mr. Rutherford?

A. I don't believe so other than the marker at 4-5.

Q. Okay.

A. As well as the spinous process at 4, that he had some osteophytes and disk space narrowing.

Q. Okay. That's what I'm referring to. Can you tell us what osteophytes and disk space narrowing refers to in that document?

A. Yes. At the L4-5 level where he had his disk herniation he had a narrowed disk space. And osteophytes are just some of the bone reaction to [62] that narrowed disk space.

Q. Okay. And does that occur within a couple months after a disk herniation or within six months in that case? Is that a typical time period?

A. You know, I think it depends on a number of factors. That's a difficult question. If you have a patient that's 300 pounds and herniates a big disk, sure, it can degenerate that disk very rapidly. Gene's a fairly big fellow I mean this was dated what, 1-6-98, so about what, five months, six – five months down the line? So certainly he could have degenerative changes by then. And then it says at L5-S1 it was slightly narrow.

Q. But those osteophytes aren't themselves a natural condition that someone has all the time?

A. No. But I mean if you're asking me do we physiologically age as we get older and do our disk spaces get narrow and do we form bony spurs, everybody does that a little bit to some extent. But does that mean that those are symptomatic structures? No.

Q. Okay. And with respect to the narrowing of the disk space or any impingement on any nerves or anything like that, those osteophytes were not [63] playing any role in that?

A. Well, I think that at the time that we did the diskectomy I looked at all of that, so when I went into Gene and we took the disk out, we felt that some of the end plates that he had were pushing back on the nerves

also, so I removed that. And that in essence, is – the end plate is part of bone so-called ostephyte or bone spur.

Q. Okay. I guess what I am asking is would that just be a natural condition that had developed without reference to any injury that he sustained?

A. Well, typically not. I mean typically as disks degenerate – see, the vertebral body – the bone perceives abnormal stress. When it perceives abnormal stress, it tries to make itself bigger. So as it makes itself bigger, it grows bone spurs. And so the bone spurs are usually a reaction from disk degeneration or loss of support of the disk for one reason or the other.

Q. Okay. And I guess going back to earlier, given the size of them they don't – that were revealed in January of '98, there is no way to tell how long those spurs had been growing?

[64] A. Well, I don't think so unless you have a film from August that says no spurs and then you have a film that shows spurs, then you can make an estimate.

Q. Now, you mentioned that Mr. Rutherford indicated he sustained some sort of a new injury or an additional injury in June of '98 lifting a railroad tie?

A. Yes.

Q. Can you tell me what the effect of that injury was on his condition?

A. Well, I mean other than what he told me –

MR. CARLEY: Doctor, hold on a second. I'm just going to object. When you say a new injury, he was

symptomatic again after that occurrence. Whether there was a new injury or not, I don't think that's been established. I [sic] going to object to the foundation of the question.

Q. Well, what I'm asking is how did that change his condition, whatever, how did that event, if at all, change his condition?

A. Well, what he told me was that he had some – or what he told my nurse when he talked to her on the phone, that he was having some increasing [65] back pain as a result from that.

Q. Okay. Prior to that was he, between the date of the surgery and that event, his pain had been tailing off?

A. I think he was doing fairly well, yes.

Q. Okay. Would you consider that a setback?

A. Yes, I would.

Q. Okay. And do you have any physiological explanation for what happened at or about that time that would have set him back?

A. Well, I think the fact that he had had surgery and again had really very little disk space at that level at his lumbar spine, that lifting a railroad tie and doing some heavy work, his back was predisposed to injure himself and that that's probably what he did at that time.

Q. Okay. And would you – is it your opinion that he further injured himself at that time?

A. Well, I think that he – it certainly was a setback for him. Now, whether it was just simply muscular, that

he irritated the muscles in his back or that he did something more extensive than that, I don't think you can predict it.

Q. Okay. Subsequent to that date did you find any additional either disk bulging of any of the [66] disks or disk space narrowing?

A. Well, we did image him, but it was, what, about a year or so after that. So he never had really other – any other imaging studies at that point immediately following so I don't know.

Q. So there is no way to tell whether or not that event had any additional impact on his condition?

A. I don't think there is a way to tell.

Q. Now, in your note of February 18 of '99 there's mention of degenerative disk disease?

A. Give me just a second.

Q. Sure. Take your time.

A. February 18?

Q. Right.

A. Okay. Yes.

Q. And I'm wondering about that term. Is that in any way – does that in any way connote a natural occurring degeneration of the disk or does it have to be related to a particular trauma or event?

A. Well, we all – I think again it's an individual thing. We all go through some element of disk degeneration as we age. But in the face of a disk herniation and

losing half the disk in the spinal canal, I think you have to assume that [67] that's going to be an accelerated process, not something that's a natural physiologic process.

Q. Okay. Does he have any degenerated disk degeneration at any other location other than L4-L5?

A. I think at L5-S1 he has some disk degeneration.

Q. Okay. Is that somewhat consistent with the L4-L5 in terms of the disk degeneration itself? In other words, is it – could it be the same event occurring at L5-S1 as was occurring at L4-S5 – L4-5?

MR. CARLEY: I think it's been asked and answered.

A. Yes. Again, I mean I feel that – that he has this disk herniation at L4-5. He has very little support at that level and so he has loaded the disk at L5-S1.

Now, I think that as we – as we kind of look at this thing, he may have had a disk injury at L5-S1 at the time of his initial injury also. I don't think – I think we've already stated we can't – we can't really say whether he did or he didn't. But I think that he has some accelerated disk degeneration at L5-S1, but I think it's mainly because of the lack of support he's [68] getting above that level.

Q. Okay. With respect to the additional treatment that you currently have been discussing with him and further surgery, is that surgery designed to relieve pain or to – in other words, is it palliative or does it involve any curative process as well?

A. Well, I think both. I think the recurrent disk herniation at L4-5, if you get rid of that, he's certainly going to have nerve root recovery as far as muscle weakness that he has.

Now, in addition to that, I hope that it will relieve pain for him. I think that it's like I tell all of my patients, I think there is a certain amount of back pain that goes along with spine fusions because they're nonphysiologic. So I think that they have to accept that fact. And as long as they understand that, and they're on the same plane with you, and the expectations are about the same, then the result usually is pretty good.

Q. Okay. And just finally, going back to the Rochester CAT scan, it does indicate that there were – Mr. Rutherford has to some extent conditions with his back that predate the [69] incident on August 20 of 1997?

A. Yes.

MR. CULLINAN: Okay. That's all I have, doctor. Thank you.

A. Thank you.

REDIRECT EXAMINATION OF JOHN A. DAVIS, JR., M.D. BY MR. CARLEY:

Q. Doctor, I just have a few more questions for you. Could we get a copy of that for him, the Rochester General Hospital CAT scan?

MR. CULLINAN: Sure.

A. Thank you.

Q. And doctor, this apparently was taken on 8-20-97, the date of the accident in question, correct?

A. Yes.

Q. Okay. With regard to L3-L4, it said there was mild facet joint degenerative changes. Is that unusual?

A. Well, I don't think it's too unusual, no.

Q. Okay. Could age cause that?

A. Yes.

Q. Okay. Could that type of condition be completely asymptomatic?

A. Yes.

[70] Q. Okay. It also says with regard to L3-L4 there was no stenosis at that time, correct?

A. That's correct.

Q. That means there was no narrowing at the L3-L4 area?

A. That's right.

Q. Okay. Now, you have taken just recently another CAT scan, correct?

A. That's correct.

Q. That did show stenosis, did it not, at L3-L4?

A. Yes.

Q. Okay. When you go down and look at L5-S1, it also notes there there were mild facet degenerative changes. Again, that could be completely asymptomatic, correct?

A. It could.

Q. And it could be caused simply by age?

A. Yes.

Q. Okay. Also, it appears that there was with regard to L5-S1, the impression of the radiologist who took that, there could be a posterior disk bulge or herniation. Is there a difference between a bulge and a disk herniation?

A. Yes.

Q. Okay. What is the difference?

[71] A. Well, in the world of spine I think that that nomenclature is very confusing. A posterior disk bulge means that there's no frank herniation of the central material through the perimeter of the disk. In other words, the posterior or the back part of the perimeter of the disk is intact. Now, disk bulges occur fairly commonly. I mean you could annuaire a hundred asymptomatic patients and you would find pathology with regard to disk bulges and even herniations in 30 to 40 percent of those patients.

The herniation, on the other hand, is an extravasation of the central portion of the disk, or some of that central portion of the disk that kind of squirts through the perimeter, classically the posterior lateral portion of the perimeter of the disk.

Q. Okay. And apparently this film, this CAT scan done on the date of the accident, that radiologist could not even tell if it was a bulge or a disk at the L5-S1 area, correct?

A. A bulge or a disk herniation?

Q. Right.

A. That is correct.

Q. Okay. And he could obviously tell that there was [72] a disk herniation at L4-L5, correct?

A. Yes.

Q. That's what he says. Let me give you a hypothetical question. If a man had a severe – or a herniation, not a bulge, but a herniation, at the L4-L5 level, do you believe he could do heavy work carrying as much as 150, 180, 200 pounds at one time?

MR. CULLINAN: Object to the form of the question.

A. Obviously, I think that that would be a difficult thing for him to do, particularly in the face of any kind of symptoms.

Q. Okay. Doctor, let me just look over my notes here.

Doctor, I'd like you to take a look at your records there. I want to ask you a question about them. That is your chart, correct?

A. Yes.

Q. Okay. Do you keep those records in the normal course of business here?

A. Yes.

Q. Okay. And are those records used in your treatment and diagnosis of patients?

A. Yes.

[73] MR. CARLEY: Okay. I would just move to mark the entire chart as Plaintiff's Exhibit 1 and move for its entry at this time.

Q. Also, I have a curriculum vitae here, doctor, which sets forth your qualifications. Could you just look that over and tell me if that's current?

MR. CULLINAN: Just for the record, I'm going to object to this question as well as the last one as being beyond the scope of redirect examination.

A. Yes.

MR. CARLEY: Okay. And I move to have this marked as exhibit Plaintiff's Exhibit 2 and would offer that into evidence at this time.

I think that's all we have.

MR. CULLINAN: Nothing further, doctor. Thank you very much.

A. Thank you.

VIDEOTAPE TECHNICIAN: Doctor, you have the right to read the transcript and review the video or you can waive that.

A. I will waive it.

[74] (Signature waived.)

(Thereupon, Plaintiff's Exhibits 1 and 2 were marked for purposes of identification.)

---

[75] CERTIFICATE

The State of Ohio,) SS:
County of Cuyahoga.)

I, Sandra L. Mazzola, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named *JOHN A. DAVIS, JR., M.D.* was by me, before the giving of his deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness, and the reading and signing of the deposition was expressly waived by the witness and by stipulation of counsel; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulation of counsel; and that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney, or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this ___ day of _____ A.D.

19___.

Sandra L. Mazzola, Notary Public, State of Ohio
14237 Detroit Avenue, Cleveland, Ohio 44107
My commission expires January 26, 2002

[76] WITNESS INDEX

	PAGE
DIRECT EXAMINATION JOHN A. DAVIS, JR., M.D. BY MR. CARLEY	3
CROSS-EXAMINATION JOHN A. DAVIS, JR., M.D. BY MR. CULLINAN	47
REDIRECT EXAMINATION JOHN A. DAVIS, JR., M.D. BY MR. CARLEY	69

EXHIBIT INDEX

	PAGE
Plaintiff's Exhibits 1 and 2	74

OBJECTION INDEX

OBJECTION BY	PAGE NUMBER
MR. CULLINAN:	45
MR. CARLEY:	50
MR. CARLEY:	51
MR. CARLEY:	59
MR. CARLEY:	59
MR. CARLEY:	64
MR. CULLINAN:	72
MR. CULLINAN:	73

Stuart Platt Letter of September 2, 1997
Platt Marine Services, Inc.

* * *

Since Mr. Rutherford is only thirty eight (38) years of age.

Before placing an initial reserve on this case, I think that we should accumulate the initial diagnostic results, or the initial testing results, to see what degree of injury Mr. Rutherford has, and then we may more properly assess the situation at that point.

Even if we believe that Lake Michigan Contractors has no liability in this case, if indeed Mr. Rutherford has at least one or two herniated discs in his back and requires surgery in the future, no matter what kind of recovery he makes, it probably would be wise to make an attempt to settle the case with him at some point in exchange for release, to alleviate any potential exposure in the future, since he has three years under the Federal Statute of Limitations to bring a suit under the Jones Act.

This three year Statue [sic] of Limitations runs from the date that the incident occurred.

You should also be advised, that the employer, meaning Lake Michigan Contractors, is mandated by law to provide maintenance and cure payments to Mr. Rutherford from the first day of his lost time, as a result of a work related injury, regardless of fault or liability.

Therefore, by copy of this letter to Mr. Joe Walsh, I would advise him that he is obligated by Federal Law to pay any and all medical bills that are generated as a result of *reasonable* and necessary care rendered to Mr. Rutherford, arising from this incident.

It would be my suggestion, that any significant medical bills be audited by a qualified medical auditor, whom we may arrange in the future if needed. This would be at no additional cost to the assured or underwriter.

Additionally, maintenance payments must be made by Mr. Rutherford, and although you are only required by law to pay $15.00 per day in maintenance, that will certainly cause Mr. Rutherford great financial strain, and since he is cooperative at this point, and does not seem interested in representation, and since I also believe I have developed a good rapor [sic] and relationship with him, and that he is willing to work with me, I believe we probably should not only pay him a maintenance check of $105.00 per week, but also an advance against lost wages, in a *separate* check, that would bring him to somewhere in the range of two thirds of his net wage, or about $80.00 per day, if you agree.

It is my understanding that Lake Michigan Contractors has a policy of paying $64.00 per day as maintenance pay, but unfortunately I believe that they may be locking themselves into a maintenance rate that is significantly higher than required, and in the event that they ever have a fraudulent case, they may not want to advance that kind of money to an individual, so they should cut two separate checks, one for maintenance and one for an advance against wages, sō that they may cease the advance at any time they wish on any given claim, if they believe that the claimant is not being receptive for [sic] cooperative, or if they believe they are financing litigation for the claimant.

I would like to have a response with respect to the maintenance issue immediately, so that the determination is made as to the amount of maintenance that we can pay to Mr. Rutherford in the future, and I may advise him accordingly. I think it is imperative that he knows what lies ahead, to maintain the relationship that we have developed.

Our goal certainly is to attempt to deal with him without attorney representation, and towards that end, it is helpful to note that Mr. Rutherford is a very religious person, and does not seem prone to attorney representation, if it can be avoided.

This completes my initial report of investigation into this matter, and I hope that you have found this information helpful to your further determinations in connection with this case.

As indicated prior, should you have any questions or need anything additional once you have read this report and the enclosures, please do not hesitate to contact me at your convenience.

Your kind attention and consideration are always appreciated, as well as your continued support and confidence in our agency.

Our interim invoice for services rendered and expenses incurred in connection with the handling of this matter on your behalf, is enclosed herewith for review and payment, which we ask that you place in line for payment at your earliest convenience.

We will retrieve the medical records and obtain the remainder of the statements of the crew, and report to you accordingly in the near future.

Your Truly,

/s/ Stuart I. Platt
Stuart I. Platt
Platt Marine Services, Inc.

SIP/mlm
enclosure

cc: Mr. Joe Walsh

Supreme Court, U.S.
FILED

MAY 10 2002

OFFICE OF THE CLERK

No. 01-1498

In the

Supreme Court of the United States

GENE A. RUTHERFORD, JR.,

Petitioner,

v.

LAKE MICHIGAN CONTRACTORS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT LAKE MICHIGAN CONTRACTORS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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67 pg

QUESTIONS PRESENTED

Whether the Sixth Circuit Court of Appeals was correct in affirming the District Court's finding that there was not a sufficient showing that Respondent, Lake Michigan Contractors, Inc. (hereinafter referred to as "LMC"), breached any duty of care owed to Petitioner, Gene A. Rutherford, Jr., and in affirming the District Court's entry of summary judgment in favor of LMC on Petitioner's Jones Act negligence claim.

Whether the Sixth Circuit Court of Appeals was correct in affirming the District Court's finding that there was not a sufficient showing that the LMC vessel, the Shirley Joy, was unseaworthy, and in affirming the District Court's entry of summary judgment in favor of LMC on Petitioner's general maritime claim of unseaworthiness.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to the Rules of the Supreme Court of the United States, Lake Michigan Contractors, Inc. makes the following disclosure:

1. Lake Michigan Contractors is not a subsidiary or affiliate of a publicly owned corporation.
2. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

I. PETITIONER'S WORK FOR LAKE MICHIGAN CONTRACTORS 2

II. STEEL CABLES AND KEVLAR LINES 3

III. THE INCIDENT IN WHICH PETITIONER ALLEGES HE WAS INJURED 4

IV. BACK BELTS AND ASSISTANCE WERE AVAILABLE TO PETITIONER TO UTILIZE IN HANDLING THE CABLES 5

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI 6

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. PETITIONER FAILED TO SHOW THAT THE STEEL CABLES WERE DEFECTIVE OR THAT PETITIONER WAS REQUIRED TO HANDLE THEM IN A MANNER THAT WAS NOT REASONABLY SAFE 7

II. PETITIONER FAILED TO SHOW THAT THE USE OF STEEL CABLE INSTEAD OF KEVLAR LINE WAS NEGLIGENT OR CREATED AN UNSEAWORTHY CONDITION 9

III. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S CONTENTIONS THAT HE WAS NOT PROVIDED WITH ADEQUATE ASSISTANCE OR A SAFETY BELT 10

IV. THE CASES CITED BY PETITIONER ARE READILY DISTINGUISHABLE FROM THE INSTANT ONE 11

V. THE EXISTENCE OF THE RETAINING WALL ON THE BOW OF THE SHIRLEY JOY CANNOT SUSTAIN PETITIONER'S CLAIMS OF JONES ACT NEGLIGENCE OR UNSEAWORTHINESS 12

VI. PETITIONER'S COMMENTARY REGARDING THE ISSUE OF COMPARATIVE NEGLIGENCE HAS NO RELEVANCE TO THIS CASE 13

VII. THE SIXTH CIRCUIT COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF LMC 13

CONCLUSION 14

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases: PAGE(S)

Brantley v. Hollywood Casino-Aurora, Inc.,
1998 WL 513089 (N.D.Ill. 1998) 8

Carleno v. Marine Transport Lines, Inc.,
317 F.2d 662 (4th Cir. 1963) 8

Carlton v. M/G Transport Services, Inc.,
698 F.2d 846 (6th Cir. 1983) 8

Chisholm v. Sabine Towing and Transportation Co., Inc., 679 F.2d 60 (5th Cir. 1983) 8

Darnell v. Target Stores,
16 F.3d 174 (7th Cir. 1994) 9

Harris v. American Export Lines, Inc.,
1980 A.M.C. 2652 (E.D.Pa. 1978)
affirmed 609 F.2d 501 (3rd Cir. 1978) 8, 14

Lindemann v. Empress Casino,
1999 WL 59839 (N.D.Ill. 1999) 8

Lyons v. Ohio River Sand & Gravel,
683 F.2d 99 (4th Cir. 1982) 8

Martinez v. Sea Land Service, Inc.,
637 F. Supp. 503 (D.P.R. 1986) 8

Roche v. U.S.,
1990 A.M.C. 2696 (E.D.La. 1990) 8

Rutherford v. Lake Michigan Contractors, Inc.,
132 F. Supp. 2d 592 (W.D. Mich. 2000) 1

Rutherford v. Lake Michigan Contractors, Inc.,
29 Fed. Appx. 395, 2002 WL 22352,
2002 U.S. App. LEXIS 441 (6th Cir. 2002) 1

Taylor v. Monsanto Co.,
150 F.3d 806 (7th Cir. 1998) 8, 9

Statute:

46 U.S.C. §688 1

STATEMENT OF THE CASE

Petitioner filed the instant lawsuit against LMC alleging causes of action for negligence under the Jones Act, 46 U.S.C. Sec. 688, and for unseaworthiness under general maritime law. (R.1, Complaint) Petitioner, a deckhand for LMC, claims that his injury occurred as he handed to his fellow deckhand, Mark Clapsadle, a heavy cable to be used to connect a tugboat to a barge. (Gene Rutherford at Tr. 73-75, Respondent's App. 12-14) Following discovery, LMC filed a motion for summary judgment which the District Court granted, entering summary judgment in favor of LMC with respect to Petitioner's Jones Act negligence claim, as well as with respect to his unseaworthiness claim. (*Rutherford v. Lake Michigan Contractors, Inc.*, 132 F. Supp. 2d 592 (W.D. Mich. 2000), R. 56, Opinion and Order, Petitioner's App. 14) Petitioner then requested that the District Court reconsider its ruling, but his motion was denied. (R. 58, Order on Plaintiff's Motion for Reconsideration of the Court's Order Granting Summary Judgment, Petitioner's App. 29)

Thereafter, Petitioner filed his Notice of Appeal to the Court of Appeals for the Sixth Circuit. (R. 66, Plaintiff's Notice of Appeal) After briefing and argument, the Sixth Circuit affirmed the summary judgment. (*Rutherford v. Lake Michigan Contractors, Inc.*, 28 Fed. Appx. 395, 2002 WL 22352, 2002 U.S. App. LEXIS 441 (6th Cir. 2002), Petitioner's App. 1)

STATEMENT OF THE FACTS

I. PETITIONER'S WORK FOR LAKE MICHIGAN CONTRACTORS

In August of 1997, Petitioner was employed as a full-time deckhand for LMC where, among other things, he handled lines and tied up barges on a tugboat called the Shirley Joy that was participating in the dredging of the Genesee River in New York. (Gene Rutherford at Tr. 11, 20, 29-30, Respondent's App. 1-4) One of the duties of Petitioner and other deckhands on the Shirley Joy was to "face up" or connect the tugboat with barges full of mud and debris dredged from the river, so that the tugboat could move the barges to another part of the river and dump them. (Gene Rutherford at Tr. 29, Respondent's App. 3-4) This procedure was accomplished by two deckhands from the Shirley Joy, though a third deckhand aboard the tugboat, who was off duty while the other two deckhands worked, was available to assist if the other deckhands thought they needed help. (Mark Clapsadle at Tr. 21, Respondent's App. 17-18)

In order to connect a full barge to the Shirley Joy, one of the deckhands, in this case Petitioner, positioned himself on the bow of the Shirley Joy, while the other, here deckhand Mark Clapsadle, stood on the barge about six to eight feet below. (Mark Clapsadle at Tr. 62, 65-66, Respondent's App. 25-26, 28-29) The deckhand standing on the Shirley Joy would, one at a time, transfer two cables to the deckhand on the barge who then connected the cables to the corners of the barge. (Mark Clapsadle at Tr. 38, 63, Respondent's App. 22-23, 26-27) In order to pass the cable, the deckhand on the Shirley Joy used a six-foot hemp rope that was attached to the cable to lower the cable to the other deckhand. (Mark Clapsadle at Tr. 28-30, 64, Respondent's App. 18-20, 27-28) The hemp rope provided leverage, so the deckhand on the Shirley Joy did not have to lean over to lower the cable. (Mark Clapsadle at Tr. 28, 65, Respon-

dent's App. 18, 28) Gravity then took over and did some of the work in lowering the cable. (Mark Clapsadle at Tr. 65, Respondent's App. 28) The deckhand on the barge (again here Clapsadle), who had the more difficult job than the other deckhand (Petitioner), thereafter took the cable and attached it to the barge. (Mark Clapsadle at Tr. 28-31, 38, 64, Respondent's App. 18-23, 27-28)

II. STEEL CABLES AND KEVLAR LINES

When Petitioner started working at the Genesee River project, LMC used Kevlar lines to connect the Shirley Joy to the barges, as opposed to the steel cables with which Petitioner had previously been familiar. (Gene Rutherford at Tr. 30, Respondent's App. 4) Kevlar lines were made of a nylon-like material, and were lighter in weight than the steel cables. (Mark Clapsadle at Tr. 33, Respondent's App. 22) LMC initially tried using the Kevlar line on the Genessee River project because it was thought to be stronger. (Wayne Moon Tr. at 22, Respondent's App. 32-33) However, the Kevlar lines, once put into use, were found to lack the durability of steel cable. (Mark Clapsadle at Tr. 60, Respondent's App. 24-25) In fact, LMC had to discontinue using the Kevlar lines, and resume using steel cables, because of problems it was having with the Kevlar lines breaking. For example, in the less than three weeks that Petitioner worked on the Genesee River project, the Kevlar lines had already broken twice, one incident occurring while a full barge was attached to the tugboat. (Gene Rutherford at Tr. 32-33, Respondent's App. 5-6)

The breaking of a Kevlar line posed a great danger to the crew of the Shirley Joy as compared to the breaking of steel cable. The propensity of steel cable when it broke was to simply drop in place. (Wayne Moon Tr. at 30, Respondent's App. 39-40) Conversely, when synthetic line (Kevlar) broke, as occurred a number of times on the Genessee River proj-

ect, the line shot back. (Wayne Moon Tr. at 30, Respondent's App. 39-40) For this reason, the Captain of the Shirley Joy ordered that the use of the synthetic line be discontinued for fear that its further breaking would result in someone getting "their head ripped off because these things shoot back like whips." (Wayne Moon Tr. at 30, Respondent's App. 39-40) Moreover, breaking lines such as this create dangerous situations because when one line used to connect a tugboat to a barge breaks, the tugboat loses control of the barge, and if all three of the lines break, the result is a runaway barge. (Gene Rutherford at Tr. 33-34, Respondent's App. 6-7; Mark Clapsadle at Tr. 70-71, Respondent's App. 29-31)

As concerns Petitioner's familiarity with steel cables, at the time he became a full-time deckhand, he anticipated that he would be using steel cables to connect and disconnect barges. (Gene Rutherford at Tr. 40, Respondent's App. 7-8) Thereafter, Petitioner himself never found the steel cables to be in any way defective, nor did he ever hear anyone complain about having to use them, other than simply complaining that they were heavier than the Kevlar lines. (Gene Rutherford at Tr. 60-61, Respondent's App. 10-12)

III. THE INCIDENT IN WHICH PETITIONER ALLEGES HE WAS INJURED

Petitioner claims that on August 20, 1997, while in the course of his normal duties as a deckhand, he suffered an injury to his back. (Gene Rutherford at Tr. 73-74, Respondent's App. 12-13) According to Petitioner, he first felt the injury he claims in this case as he stood on the bow of the Shirley Joy, while another deckhand, Mark Clapsadle, stood below him on a full barge which they were in the process of connecting to the Shirley Joy. (Gene Rutherford at Tr. 73-74, Respondent's App. 12-13)

Petitioner claims he experienced pain as he handed the first cable down to Clapsadle, which he did by using the six-foot hemp rope that was attached to the cable. (Gene Rutherford at Tr. 75, Respondent's App. 13-14; Mark Clapsadle at Tr. 28-30, 64, Respondent's App. 18-20) Petitioner admits that he did not injure his back while lifting the cable, but rather after he already had the cable in hand and was giving it to Clapsadle. (R.42, Plaintiff's Response to Summary Judgment, p.4, Petitioner's App. 34)

IV. BACK BELTS AND ASSISTANCE WERE AVAILABLE TO PETITIONER TO UTILIZE IN HANDLING THE CABLES

It is undisputed that safety belts were available to Petitioner to utilize in handling the cables. Wayne Moon, the Division Manager of LMC, testified that safety belts were provided to the deckhands. (Wayne Moon at Tr. 34, Respondent's App. 43) Mark Clapsadle confirmed this fact by testifying that there was a safety belt aboard the Shirley Joy. (Mark Clapsadle at Tr. 55, Respondent's App. 24)

It is also undisputed that Petitioner knew as a matter of common sense the proper method for lifting heavy objects. (Gene Rutherford at Tr. 51, Respondent's App. 8). Moreover, there was a third deckhand aboard the Shirley Joy if Petitioner needed assistance in handling the steel cables. (Mark Clapsadle at Tr. 21, Respondent's App. 17-18) As Clapsadle testified, if deckhands thought they needed help, they could call another deckhand up on deck. (Mark Clapsadle at Tr. 21, Respondent's App. 17-18)

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals properly affirmed the District Court's entry of summary judgment in favor of LMC because Petitioner could make no factual or legal showing that might allow a jury to conclude that there was negligence on the part of LMC, or that the vessel, the Shirley Joy, was unseaworthy. (Petitioner's App. 1-13) In fact, Petitioner presented evidence of nothing more than his being injured while performing his normal job duties of handling a steel cable, a task that the Sixth Circuit Court of Appeals found was routinely and frequently performed by deckhands without injury. (Petitioner's App. 11) As a legion of maritime decisions makes clear, such a showing fails to provide the basis on which to sustain either a Jones Act negligence claim, or an unseaworthiness claim.

The Petition for Writ of Certiorari of Petitioner is fundamentally ill-conceived. It is simply a repackaged version of the virtually identical failed arguments that Petitioner made to the Sixth Circuit Court of Appeals. As he did before the Sixth Circuit, and as he did in the District Court prior to that, Petitioner here does little more than thrust a multitude of cases upon this Court, cases which are all clearly distinguishable from the instant one, and which were all considered and properly rejected by the Sixth Circuit. Thus, for no greater reason than he disagrees with the decision of the Sixth Circuit Court of Appeals, Petitioner now asks this Court to review this case even though the Sixth Circuit properly applied age-old principles of maritime law.

When stripped of its rhetoric, it is beyond question that the Petition for Writ of Certiorari of Petitioner satisfies none of the standards set forth in the Supreme Court Rules pursuant to which this Court may grant a petition for writ

of certiorari. To the contrary, as demonstrated in this brief, the Sixth Circuit Court of Appeals' decision affirming the District Court's entry of summary judgment in favor of LMC is consistent, rather than in conflict, with prior decisions of this Court, and with decisions of not only other United States Courts of Appeals, but lower courts as well, wherein maritime law was applied.

ARGUMENT

I. PETITIONER FAILED TO SHOW THAT THE STEEL CABLES WERE DEFECTIVE OR THAT PETITIONER WAS REQUIRED TO HANDLE THEM IN A MANNER THAT WAS NOT REASONABLY SAFE

Petitioner presented not one scintilla of evidence to establish that the steel cables were in any way defective. This fact was aptly noted by the Sixth Circuit when it stated, "There was no evidence on the condition of the cable that plaintiff was handling, other than that it was heavier than the synthetic cable, and that it weighed 120 to 150 pounds." (Petitioner's App. p. 12) Nor did Petitioner present any evidence of his having been required to handle the cable in a manner that was not reasonably safe. This again was particularly noted by the Sixth Circuit Court of Appeals which found it significant that Petitioner offered "no evidence, expert or otherwise, in this case that one deckhand could not safely handle a steel cable." (Petitioner's App. 12) Instead, as the Sixth Circuit held, "All that plaintiff showed in this case is that he hurt his back while performing a task that was routinely and frequently performed by deckhands without injury." (Petitioner's Apx. 8)

Now, in his Petition for Writ of Certiorari before this Court, exactly as he did in the lower courts, the only thing that Petitioner says about the cables themselves, and which is, in fact, the essence of Petitioner's claims of negligence and unseaworthiness against LMC, is that the steel cables

he was required to handle as part of his duties as a deckhand were heavy and awkward to move. (Petitioner's Petition, pp. 10-11). However, maritime law clearly rejects the notion that a vessel owner can be liable for merely requiring a seaman to move or lift heavy or awkward objects. Rather, to obtain any remedy under maritime law, other than maintenance and cure, there must be some factual and legal basis to support liability of the shipowner under the Jones Act for negligence or for unseaworthiness. *See Carlton v. M/G Transport Services, Inc.*, 698 F. 2d 846 (6th Cir. 1983); *Chisholm v. Sabine Towing & Transportation Co.*, 679 F.2d 60 (5th Cir. 1982); *Carleno v. Marine Transport Lines, Inc.*, 317 F.2d 662, 664 (4th Cir. 1963); *Lyons v. Ohio River Sand & Gravel*, 683 F.2d 99, 101 (4th Cir. 1982); *Harris v. American Export Lines, Inc.*, 1980 A.M.C. 2652 (E.D. Pa. 1978) *affirmed* 609 F. 2d 501, (3rd Cir. 1978); *Martinez v. Sea Land Service, Inc.*, 637 F. Supp. 503 (D.P.R. 1986); *Roche v. U.S.*, 1990 A.M.C. 2696 (E.D. La. 1990). Here, there is none.

In both the District Court and in the Sixth Circuit Court of Appeals Petitioner attempted to make up for his evidentiary shortcomings with his own unsupported and conclusory claim that LMC should have used Kevlar lines rather than steel cables. However, case law has consistently declared that this type of speculation and conjecture is insufficient, as a matter of maritime law, to support a claim that an employer failed to exercise reasonable care within the meaning of the Jones Act, or failed to provide equipment that was reasonably fit within the meaning of the general maritime doctrine of seaworthiness. *See e.g., Carlton v. M/G Transport Services, Inc.*, 698 F. 2d 846 (6th Cir. 1983); *Brantley v. Hollywood Casino-Aurora, Inc.*, 1998 WL 513089 (N.D. Ill. 1998); *Lindemann v. Empress Casino*, 1999 WL 59839 (N.D.Ill. 1999) (motion to reconsider denied) *citing Taylor v. Monsanto Co.*, 150 F.3d 806, 809 (7th

Cir. 1998) and *Darnell v. Target Stores*, 16 F.3d 174, 176-77 (7th Cir. 1994).

Plaintiff's conjecture fails as a matter of law, in short, because there is a total void of evidence that in any way indicates that the steel cables used by LMC, and which Petitioner knew he would be handling before he was injured, were defective, unsafe, or failed to meet the standard of reasonable fitness. Moreover, as concluded by the Sixth Circuit, "There was no evidence that having one deckhand handle a steel cable was either dangerous or an unorthodox method or practice." (Petitioner's App. 8)

II. PETITIONER FAILED TO SHOW THAT THE USE OF STEEL CABLE INSTEAD OF KEVLAR LINE WAS NEGLIGENT OR CREATED AN UNSEAWORTHY CONDITION

Petitioner baldly asserts that LMC was negligent, and that the Shirley Joy was unseaworthy, because synthetic line was stronger and safer than steel cable, was preferred by crewmembers, and was a viable alternative to steel cable. (Petitioner's Petition, pp. 11-14) However, again, there is simply no evidentiary support in the record that establishes that steel cable was not reasonably fit and safe to use to face up the Shirley Joy to a barge. Furthermore, Petitioner provided no evidence that established that the non-use of synthetic line proximately caused his alleged injury. Put bluntly, merely saying it does not make it so.

As clearly articulated by the trial court (and affirmed by the appellate court), Petitioner "has simply presented no evidence that the lighter, synthetic cables would have made his back injury less likely to occur." (R. 56, Opinion and Order, p. 6, Petitioner's App. 20) Thus, without any evidence, Petitioner's self-serving and conclusory allegations, not in any way supported by the evidentiary record, were

properly rejected by the District Court and by the Sixth Circuit Court of Appeals.

III. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S CONTENTIONS THAT HE WAS NOT PROVIDED WITH ADEQUATE ASSISTANCE OR A SAFETY BELT

Petitioner also tries to avoid addressing the non-defectiveness of the steel cable by merely claiming that he was not provided with adequate assistance, or with a safety belt, in his handling of the cable, and that his lifting the cable would have been easier if he had been assisted by another man. (Petitioner's Petition, p. 16) However, there is nothing in the record that even remotely suggests that more than two deckhands were needed in order to handle the cables safely. Rather, as the Sixth Circuit Court of Appeals found, "There was no evidence that having one deckhand handle a steel cable was either dangerous or an unorthodox method or practice." (Petitioner's App. 8) Nor was there any evidence that LMC precluded Petitioner from obtaining assistance in handling the cables, if Petitioner believed such assistance was necessary. In fact, such assistance was available, simply by asking.[1]

Moreover, it was undisputed that safety belts were available to Petitioner to utilize in handling the cables. (Wayne Moon at Tr. 34, Respondent's App. 43; Mark Clapsadle at Tr. 55, Respondent's App. 24) Yet, even if such safety belts were not available, as the Sixth Circuit Court of Appeals pointed out, "There was no evidence upon which a jury could reasonably find that weight belts would have prevented plaintiff's injury or reasonably find that defendant's failure to provide them constituted negligence." (Petition-

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[1] As testified by Mark Clapsadle, if deckhands thought they needed help, they could, in fact, request a fellow deckhand to come up on deck to assist. (Mark Clapsadle at Tr. 21, App. 17-18)

er's App. 11) The Sixth Circuit also noted, "Nor was there any evidence that weight belts were necessary to permit the deckhands to lift the steel cable with reasonable safety." (Petitioner's App. 12) Thus, there was no evidentiary basis to support Petitioner's conclusory allegations and, in fact, the undisputed evidence demonstrates the opposite.

IV. THE CASES CITED BY PETITIONER ARE READILY DISTINGUISHABLE FROM THE INSTANT ONE

The Sixth Circuit Court of Appeals previously considered the same cases that Petitioner now advances in its Petition for Writ of Certiorari. In doing so, the Sixth Circuit determined that all of the cases relied on by Petitioner were distinguishable from the instant case due to "the existence of evidence of negligence" in those other cases. (Petitioner's App. 8) That is, in each case (unlike here) there was evidence of some defective or dangerous condition apart from the fact that an object being lifted or handled was heavy.

Contrary to all of those cases, however, here there was no evidence of negligence on the part of LMC, or of the unseaworthiness of the Shirley Joy. There was no evidence that Petitioner and Clapsadle constituted an insufficient number of crewmen to handle the steel cables safely; there was no testimony from a safety expert or other qualified individual (aside from Petitioner's own speculation and conjecture) regarding the weight and stress placed on an individual engaged in lifting the steel cable, and the relative safety of an individual doing so; there was no evidence that either Petitioner or Clapsadle were too inexperienced, inept or exhausted to handle the steel cables safely; there was no evidence that established that the steel cables, or any aspect of the Shirley Joy, were not working properly or were defective; and there was no evidence of Petitioner or anyone else having complained to Lake Michigan Contractors about anything that prevented them from handling the

steel cables safely. As such, the cases cited by Petitioner have absolutely no relevance to the case before this Court, other than to magnify by contrast the lack of evidence which exists here.

V. THE EXISTENCE OF THE RETAINING WALL ON THE BOW OF THE SHIRLEY JOY CANNOT SUSTAIN PETITIONER'S CLAIMS OF JONES ACT NEGLIGENCE OR UNSEAWORTHINESS

With no evidence of a defect in the steel cable, Petitioner desperately argues that the Shirley Joy itself was defective because it had a retaining wall near the bow which prevented him from bending at the knees while lifting the cable. (Petitioner's Petition, pp.14-15) However, this is simply a false issue. Initially, Petitioner again offers no evidence, expert or otherwise, to support his contention that the wall presented him with an unreasonably dangerous condition in which to handle the cable. Moreover, Petitioner's own deposition testimony undermines his contention. As Petitioner testified, "There's got to be a wall there. If the wall wasn't there the water would be coming right on the boat. . . It breaks the waves . . . anybody knows that if you got a boat it's got to have a wall or water is going to come in it." (Gene Rutherford at Tr. 123-124, Respondent's App. 14-16)

Additionally, Petitioner's own deposition testimony and his District Court Response brief establish that the retaining wall had nothing to do with his alleged injury. In both, Petitioner asserted only that the wall inhibited his ability to pick up or lift the cable. (R.42, Plaintiff's Response to Summary Judgment, p.6, Petitioner's App 37; Gene Rutherford at Tr. 51-53, Respondent's App. 8-10) Further, in his District Court Response brief, Petitioner candidly admitted that his injury occurred, not while he was lifting the cable, but rather after he already had the cable in hand and was

giving it to Clapsadle. (R.42, Plaintiff's Response to Summary Judgment, p.4, Petitioner's App. 34)

As described above, passing the cable to Clapsadle did not require Petitioner to bend or lean over. (Mark Clapsadle at Tr. 28, 64-65, Respondent's App. 18, 27-28) Thus, the difficulty Petitioner claims he had in bending at the knees because of the wall could not have caused his alleged back injury.

VI. PETITIONER'S COMMENTARY REGARDING THE ISSUE OF COMPARATIVE NEGLIGENCE HAS NO RELEVANCE TO THIS CASE

A substantial portion of Petitioner's brief is dedicated to advising this Court that Petitioner's own negligence in causing his injury does not necessarily bar a seaman from recovering damages under the Jones Act or for unseaworthiness. LMC does not dispute this point, and in fact readily accepts it as a correct proposition of maritime law. However, the issue of comparative negligence only has relevance in cases where plaintiffs can first sustain their claims with some evidence of negligence on the part of their employer, or evidence of the unseaworthiness of their employer's vessel. On the other hand, as in this case, where there is no evidence of the employer's negligence or of the unseaworthiness of the vessel, whether the plaintiff himself was or was not negligent in causing his own injury does not affect the outcome of the case. The plaintiff simply can recover nothing, an amount which cannot be further diminished by his own negligence.

VII. THE SIXTH CIRCUIT COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF LMC

When the factual record is devoid of any support with respect to arguments raised by a plaintiff in opposition to

a motion for summary judgment, the arguments should be rejected. *See e.g., Harris v. American Export Lines, Inc.*, 1980 A.M.C. 2652 (E.D. Pa. 1978) *affirmed* 609 F.2d 501, (3rd Cir. 1978). Here, as correctly concluded by both the District Court and the Sixth Circuit Court of Appeals, Petitioner failed to produce any evidence of negligence on the part of LMC, or of the unseaworthiness of the Shirley Joy. (Petitioner's App. 1-13) Rather, in total, the evidence that Petitioner did put forth established nothing more than that Petitioner was injured while performing his normal job duties of handling a steel cable that was heavy. (Petitioner's App. 11)

In light of the lack of evidence that LMC was negligent or that the Shirley Joy was unseaworthy, there was no basis on which to sustain Petitioner's claims under maritime law. Therefore, the District Court was correct in entering summary judgment in favor of LMC as a matter of law, and accordingly, it was also proper for the Sixth Circuit Court of Appeals to affirm the District Court's entry of summary judgment in favor of LMC.

CONCLUSION

Petitioner's status as an aggrieved litigant whose claim has been rejected on the basis of well-settled legal rules is no different from that of numerous other disappointed suitors. He offers no valid reason why this Court should grant his Petition for Writ of Certiorari and review the well-reasoned and absolutely correct decision of the Sixth Circuit Court of Appeals.

In particular, Petitioner is unable to establish that any conflict exists among various circuits of the United States Court of Appeals that might be relevant to his claims, and is unable to establish that the decision of the Sixth Circuit Court of Appeals herein was inconsistent with established

maritime law. The reason for his failure is fundamental—nothing in the maritime law exists that permits a plaintiff to avoid a motion for summary judgment, and to proceed on his claims of Jones Act negligence and unseaworthiness, when the record is void of evidence of negligence on the part of the vessel owner, and void of evidence of the unseaworthiness of the vessel.

As such, the well-considered decision of the Sixth Circuit Court of Appeals should be allowed to stand as the final disposition of this action, and the Petition for Writ of Certiorari should be denied.

WHEREFORE, based upon the foregoing, Respondent, Lake Michigan Contractors, Inc., respectfully requests that this Court enter an Order denying the Petition for Writ of Certiorari of Petitioner, Gene A. Rutherford, Jr.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS TO APPENDIX

PAGE

Deposition Transcript of
Gene A. Rutherford ..... App. 1

Deposition Transcript of
Mark David Clapsadle ..... App. 17

Deposition Transcript of
Wayne Moon ..... App. 32

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENE A. RUTHERFORD, JR.,)
)
Plaintiff,)
vs.) Case No. 1:98CV769
) Hon. Wendell A. Miles
LAKE MICHIGAN)
CONTRACTORS, INC.,)
)
Defendant.)

Deposition of GENE A. RUTHERFORD, JR. taken under the provisions of the Federal Rules of Civil Procedure before Carrie S. Clark-Berry (CSR-4402), Certified Shorthand Reporter and Notary Public, at Sukup & Grimm, 146 Monroe Center, NW, Suite 1526, Grand Rapids, Michigan, on Thursday, May 6, 1999, commencing at 11:32 a.m., pursuant to Notice.

* * * * * *

[11] Q. Are all of those various tasks done on land?

A. Yeah. And then I did some fill-in on tugs when needed.

Q. Now at some point did you change positions to the position of deckhand?

A. Yes.

Q. Okay. Do you recall when that was?

A. Well, I did it once—what was it, '96? I think once in '96. I worked for a little over a week on a tug as deckhand.

Q. Okay. And then at some point later on—

A. In '97.

Q. —in '97 you began working as a deckhand full time?

A. Yes, in Rochester.

Q. Do you know specifically when in '97 you became a full-time deckhand?

A. It was in August of '97.

Q. Okay. Possibly late July of '97 or early August?

A. Yeah.

Q. And prior to then, late July or early August of '97, you had worked as a deckhand for about one week; is that correct?

A. You mean in '96?

* * * * * *

[20] deckhand in '97 did you do any sort of training at that time?

A. No.

Q. Were you continuing to learn as you went along?

A. Yes.

Q. Or had you learned up to that time all there was to learn about being a deckhand?

A. No, I never learned it all. There's a lot to decking.

Q. Okay. And when you started as a full-time deckhand then the first project you worked was where?

A. Rochester, New York.

Q. And what vessel were you on?

A. Shirley Joy.

Q. Can you describe the project that was going on in Rochester, New York?

A. We were dredging the Genesee River.

Q. Can you explain a little bit what dredging the river entails?

A. It's where they take the mud and debris out of the river so the bigger vessels can come through.

Q. Was this project being done entirely by Lake Michigan Contractors?

* * * * * *

[29] some days, you know. It all depends on the situation.

Q. What generally were your duties and responsibilities on the Shirley Joy? Were they similar to what you described your duties were on the Curly B?

A. Basically whatever you're told to do as a deckhand.

Q. Since you were up there for a limited period of time, about three weeks or so, can you tell me generally the types of things that you did out there on the Shirley Joy?

A. Well, we faced up the barges.

Q. And by that you mean connected the barges to the tug?

A. Connected the barges, yup.

Q. Okay. What else?

A. We'd have to dump. Take them out to the lake and dump them. And we'd have to clean the boat, check the engines, change the oil if it was needed.

Q. And reattach barges to the dredge?

A. Yes.

Q. What did dumping the barges in the lake entail?

A. You go out about a mile and a half out in the

[30] lake, and the barges have pockets in them. They've got a diesel engine on the barge itself. You start it up, and then what they do is they pop the pockets and it just lets the mud out the bottom.

Q. What does the deckhand do in terms of bringing about the dumping of the barge?

A. He has to climb up—or down on the barge when it's full, start the engine up on the barge, and pop the pockets.

Q. Popping the pockets is done mechanically?

A. Sometimes. There was one barge or two barges we had to do manually on some pockets. The pockets wouldn't open so you'd have to take a bar and pry up—I don't know what you call it. The ram on the side would be locked and you'd have to try to pry it up on the bar. You'd have to take two deckhands.

Q. Now in terms of facing up barges or attaching or de-attaching them from the barges—from the dredge, were you again using the same types of cables that you used when you were working on the Curly B?

A. No. At the time I was on the Shirley Joy, at that time we had—I think the name of it was

[31] Kevlar lines.

Q. Kevlar lines?

A. Kevlar, yeah.

Q. K-e-v-l-a-r, I think this is. Can you describe what those are?

A. It's like rope. It's lightweight.

Q. Can you tell me how Kevlar lines are different from the cables that you described that you were using on the Curly B?

A. A whole lot lighter. I mean you can lift it with one hand.

Q. When you say "it," you're talking about the four feet or so that you normally have to hold?

A. Yeah.

Q. With the eye of the line?

A. Yeah.

Q. So it sounds like those lines were no more than how much weight?

A. I just—just hardly any weight at all there.

Q. The steel cable, could you hold it with one hand?

A. No. You'd have to hold on with two hands because—if you're on a muddy barge and you have to have one hand on the cable you take a chance of getting pulled into the lake or the

[32] river or whatever. I mean there's a lot of weight there.

Q. And did you use the Kevlar lines the whole time that you were out there on the Rochester project?

A. Not the whole time, because we had to go to steel cables because the Kevlar lines broke.

Q. Can you tell me what period of time during those three weeks you used Kevlar lines versus steel cable?

A. Most of the time I was up there we had Kevlar. I don't remember exactly when we changed to the steel ones.

Q. Had you ever observed the Kevlar lines breaking?

A. Yes.

Q. Can you tell me how many times when you were on that project the Kevlar lines broke?

A. Two.

Q. Where did they break?

A. I guess you would call it right at the shock. What I mean by the shock is where it's coming off of the tug on the side. It's like a shock absorber, they call it, but it's bigger rope.

Q. And both instances it broke about the same place?

[33] A. Yeah, basically.

Q. And in those two instances was it a full barge or an empty barge that was attached to the tug?

A. I think once it was a full one and once it was an empty one. I'm not positive on that.

Q. Do you recall what happened when the lines broke?

A. Well, we were pushing the barge, and when the line breaks the barge can get away from the tug.

Q. How many lines were there from the tug to the barge?

A. You usually run three.

Q. And if one of those three is disconnected can the tug lose control of the barge?

A. Well, you got one on each side of the boat that goes up to the bits on the barge itself and then what they call—in the bow on the center of the tug we usually throw a soft line, they call it, just for safety in case one of the side lines do break the barge don't get completely away.

Q. And obviously if all of the lines from the barge to the tug broke then the tug would lose control of the barge?

A. You'd have a runaway barge.

[34] Q. Was there other—were there other vessels in the Rochester River anywhere near where you were working?

A. You mean besides Lake Michigan?

Q. Right.

A. Yes. There was boats in some places in the river. I guess you call it docked.

Q. About how far away from where you were working?

A. They were docked all up and down the river there.

Q. How close did the other boats come to where you were working?

A. Some of them got pretty close. Four or five feet away sometimes. It all depends on what side of the river they were doing.

Q. I take it then that a runaway barge would have presented quite a danger to other vessels in that river?

A. If it broke in the river, yeah.

Q. Right.

A. If it broke when you were out on the lake in rough water or—you know, it all depends on the circumstances.

Q. Were there other vessels out on the lake?

A. Yeah. There's traffic in and out.

* * * * * *

[40] Q. And those—it turned out to be the cables you actually worked with were the type that you expected you would be working with?

A. You mean did I know they were going to be steel cables and not Kevlar or whatever?

Q. Right.

A. Well, actually I don't really know because I didn't even know about the Kevlar.

Q. Well, what I'm saying is, based on your prior experience, when you started full time did you expect that you would be using steel cables to do the work?

A. I thought I would. When I got up there they had the Kevlar in there. They were running Kevlar when I got up there.

Q. But ultimately then the steel cables that they switched back to—or they switched to were the ones that you originally expected you'd be using anyway?

A. Well, I've used them before, if that's what you're asking. I knew that they were on there.

Q. So that didn't come as any surprise, right?

A. No.

Q. And the size of the cable was basically what you expected?

* * * * * *

[51] nothing to show. You just grab it. You're just standing there, you grab it, and throw it up on the mold.

Q. Any other jobs or any other experience that you had where you were trained in how to lift equipment or objects or anything of that nature?

A. There's no job I ever worked that actually showed me how to pick things up.

Q. Okay.

A. Automatically I know to use my knees. I mean that's common sense.

Q. And when you say "use your knees," can you be—

A. Bend at the knees to pick up. In some cases you can't bend at the knees. Like on the boats when you're handling cables on the side you cannot bend.

Q. Okay. And describe again why it is that you can't bend on the boats.

A. Because you would hit your knees on the side. You got the side of the boat here (indicating), and you got to reach over the side to get a cable. How are you going to bend? You're going to bump your knees.

Q. Okay. On the barge there's no sides, right?

A. On the barge itself?

[52] Q. Right.

A. Well, on the outside, no. There's like a wall that goes completely around the barge about, I don't know, two, three-foot high.

Q. Okay.

A. But on the outside, no.

Q. In terms of when you're lifting cable there, the same problem you had bending your knees on the boat is not present on the barge; is that correct?

A. When I was on the barge taking the cables off to hand them to the deckhand on the boat and we was taking them off of the barge I would bend at my knees.

Q. Okay. So you were able to bend your knees on the barge?

A. Yes. You can bend over and grab it and get it. Because they used to laugh at me the way I done it.

Q. Is that problem that precludes you from bending at the knees on the boat present in all areas of the boat where you were lifting cable or just particular areas of the boat?

A. You mean bending at the knees while you're taking the cables off?

[53] Q. Right.

A. That's the only place we had to take the cables off, is at the bow of the boat. You cannot bend at the knee and pick up the cable.

(Deposition Exhibit #4 was marked for identification.)

Q. Let me show you a photograph that we've marked as Exhibit #4. I'll ask you to take a look at that for a second.

(Witness examines document.)

Q. Can you tell what this is depicting in the photograph?

A. That's the Shirley Joy.

Q. And that's the boat you were working on on the Rochester project, correct?

A. Yes, sir.

Q. Okay. Do you have a pen down there? Actually I'll give you a yellow marker here that hopefully will show up on there.

MS. SCHORNACK-SMITH: Can we take a break?

MR. CULLINAN: Sure. (Brief recess.)

Q. Going back on the record, very early on I had mentioned—we were discussing one of the

* * * * * *

[60] of the deckhands is standing on the front handing the cable to the deckhand who's on the barge?

A. Yeah. One deckhand here handling the cables to hand them over to the barge over here (indicating).

Q. Okay. And the deckhand that's on the barge is on the flat surface with nothing obstructing him from using his knees to bend, correct?

A. Right.

Q. Okay. Did any of the crew members of the Shirley Joy ever complain about any of the equipment they were provided on the Rochester project?

A. Complain about the equipment?

Q. Right.

A. I've heard guys say their back is sore from lifting cables. I mean—

Q. Did you ever hear any complaints about the cables themselves that they were using either being defective or not sufficient to allow them to do whatever they were doing?

A. Not that they were defective. I mean they get old, they get frayed, like I told you. That's expectable, I guess. They're hanging in the

[61] water, they get rusty.

Q. Okay. Did you ever hear anyone complaining about the condition of the cables?

A. There's been times they say we're going to have to change them because they were looking bad and frayed. What I mean by "frayed" is they're steel and you have spots that break loose that come out in your hand and it cuts your hand.

Q. Okay. Did you ever hear anyone on the crew of the Shirley Joy complaining about anything else having to do with the cables aside from the fraying?

A. Just, like I said, they said their back was sore from lifting them.

Q. And did those complaints have anything to do with the physical qualities of the cable themselves?

A. The cables are heavy. There's no doubt about it. I mean you take steel, compare it to Kevlar, a 100 percent difference.

Q. Would the amount of cable that you had to handle in working as a deckhand at any given time be more than 25 pounds?

A. Oh, yeah. Definitely.

Q. Can you give me a rough estimate of what the

* * * * * *

[73] Q. Did you miss any time at work?

A. Yeah, but I don't recall how long on that one. I quit that job and got another job.

Q. Were the areas of your back on each of these occasions the same?

A. The same as relating to what?

Q. Did you hurt the same area of your back in the first instance as you did in the second instance?

A. I don't know if it was the same or not. I mean it's just like I pulled a muscle and my back was sore.

Q. Was this in your lower back or your upper back?

A. Lower.

Q. On both occasions?

A. I think so, yeah.

Q. Now aside from those two instances, prior to August 20 you hadn't had any other problems with your back; is that correct?

A. You mean after the second one you've just written down?

Q. Yeah.

A. No, sir.

Q. And then at some point on August 20th of 1997 you began having pain in your back?

[74] A. Yes.

Q. Okay. And that was the first time in the relatively near past that you had had any pain? In other words, for the first 19 days of August you hadn't had any pain in your lower back?

A. I mean a little sore. Like I said, all the other guys, you know lifted the cables and you're sore. But what you're asking me though, when I got hurt it was severe. I never had nothing like that.

Q. Okay. And did that happen all at once on August 20th of '97?

A. Yeah.

Q. Okay. When that began happening all at once can you tell me exactly what it was you were doing?

A. I was handing the cable to Mark on the barge.

Q. Where were you standing?

A. On the bow of the tug.

Q. Were you connecting or disconnecting the barge?

A. Connecting to a full barge.

Q. So you were about to remove that barge to dump it somewhere down the lake?

A. Yeah. It was connected to the Ojibway.

Q. Now when you are going out to take a full barge to dump it am I correct that you would connect

[75] the tug first to the barge and then disconnect the barge from the dredge?

A. Yes.

Q. And is that what you were doing at that time?

A. Yeah.

Q. Okay. So at the time you started feeling pain was it still connected to the dredge, the barge?

A. We were connecting to the barge. When I grabbed the first cable on port side, and I don't remember if the cable was stuck on a tire or what, but I had to bend over the side to get it to hand it to Mark.

Q. Okay.

A. To connect up.

Q. Okay.

A. That's when I felt a pain in my back.

Q. All right. And then what happened?

A. I tried to brush it off, you know. And I knew I felt something, but I went over and was finishing my job. I went over to get the other cable, than I climbed down on the barge to help Mark get the cables off the side of the barge from the Ojibway. He was on the head and I was on the stern, I guess you would call it. And then I picked up that cable. And I remember

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[123] A. Why?

Q. Yeah.

A. I haven't even tried fishing. I come home from work now and I hit the couch. I'm whipped. I mean, I'm dead tired. I don't feel like doing anything.

Q. Is that because of your back or just because of the nature of your work?

A. It's because of my back, yeah. It's because of my back.

Q. That wall around the sides of the Shirley Joy—

A. The wall around here going around the boat (indicating)?

Q. Right. Do you have any understanding of what that wall is for?

A. There's got to be a wall there. If the wall wasn't there the water would be coming right on the boat. It's like a V. It breaks the waves. I mean that's pretty obvious.

Q. And the way it is shaped in that photograph and the way it actually is shaped, in your opinion is that necessary to break the waves, et cetera? The height, et cetera?

A. Yeah, there's no doubt.

MS. SCHORNACK-SMITH: I'm not

[124] sure there's foundation to ask questions about ship building questions.

A. I'm not a boat expert.

MS. SCHORNACK-SMITH: Ship design.

A. I don't know what you're trying to get at. I'm not a boat expert.

Q. All right. But based on your experience there is a purpose for that wall to be there?

A. I don't know what you're trying to get at. I mean, anybody knows that if you got a boat it's got to have a wall or water is going to come in it.

Q. So it does have a purpose then as far as you know?

A. I don't know what you're getting at. What do you want me to tell you?

Q. I just want you to answer the question.

A. I don't understand what you're trying to ask me.

Q. Based on your knowledge is there a purpose of the wall? You said—

A. If you didn't have a wall there you'd fall off the boat or whatever. So evidently it has to be there.

Q. So is the answer yes then?

* * * * * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 1:98-CV-769
	)	
LAKE MICHIGAN CONTRACTORS, INC.,	)	
	)	
Defendant.	)	

Telephone deposition of MARK DAVID CLAPSADLE, taken pursuant to Notice, at 141 Pin Oak Drive, Williamsville, New York, on July 8, 1999, commencing at 11:20 a.m., before ADRIANNE HUNT, C.P., Notary Public.

[21] six-hour shifts all the time and somebody else not having to.

Q. Okay. But for the most part there were three people participating when it came to loading or, I'm sorry, facing the wires between the tug and the barge?

A. No. When you would face up, there would only be two.

Q. Okay. I guess that's where I wasn't clear.

A. One of the guys that had his six-hour shifts, only one of them guys is on his shift. The other guy has his six hours off.

Q. Okay. I thought it was the flopper that worked opposite the other two guys?

A. No, the flopper works with both guys.

Q. All right.

A. Only—only when he's needed.

Q. Okay. Who—did you, as a deck hand, could you make the decision to call him up, get him up out of bed, you know, call him up on deck if you thought you needed help?

A. That's correct. We would already been mated to the empty because we went out and dumped it. We came back with it empty after we dumped on the lake. We

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Clapsadle - Shornack-Smith - 07/08/99

[28] deck hand on the bow of the tug, which would lower a hemp rope that was hooked right up to your cable, rather than trying to lean all the way over and hand the cable, we had an extra six-foot of line to where you could just hand the cable down hand-over-hand on a hemp rope. That would be handed to the other deck hand which was already down below on the barge.

Q. Okay. But the cable itself is—I understand there's a winch. Is there a length of it that—you know, attached or hanging off the bow? Where is that actually stored?

A. when it's not in use, once we unhook off of the empty—well, on the empty barge, your height of your barge is up higher with the bow. When you hook to a loaded barge, the barge is sunk more in the water because of the weight of the mud and sludge it's loaded in it. So you're working with two different levels as you're hooking and unhooking there.

Q. Okay. Which requires you to do what? How do you—you described a six-foot hemp rope?

A. Yes.

Q. And that's somehow attached to what, the end of the cable?

[29] A. Your cable coming off of the tug is more or less a double cable. It's a hoop. You're coming off of the winch, out doing a hoop around the bit on the barge, then the cable comes back, and the end of that is hooked into the side of the tug, farther back from the winches.

Q. Okay.

A. So you're coming off the side of the tug, out around the bit, and then back into the winch.

Q. So the hemp line is what's hooked to that hoop?

A. It's more or less on a slide clevis. So that it does slide on the cable.

Q. But where is the hoop of the cable when that rope is not being used?

A. The hoop of the cable if that cable is not being used, that cable is brought up and hooked right on the bit that's right on the bow of the boat.

Q. Okay. And the hemp line is then located where?

A. That would just be hanging inside right on the front deck.

Q. Now, is the—is any of the cables stored over the side of the tug at all?

A. All of the cable is stored. You don't bring the

[30] cable on. The cable is more or less hung over the edge of the bow. And brought up to where just the hoop of the cable is around the bit on the front of the tug.

Q. Okay. So I take it when you're lifting this hemp rope that's attached to this hoop at end of this cable, right?

A. You would unhook the—the hoop that's on the bit on the front of the tug, you would unhook that by holding the cable. Once you have it unhooked off the bit, you would grab hold of the hemp rope and lower the hoop of the cable down, holding onto the hemp rope.

Q. Okay. And then it's the person on the barge that takes the hemp rope?

A. Correct.

Q. And pulls the slack of the cable out towards them?

A. Correct.

Q. And pulls the slack of the cable out towards them?

A. Correct.

Q. Okay. Now, is that—I guess I need you to explain is how—is that pulling from the winch?

In other words, if it's looped over the side of the tug, and all this guy on the barge has is the hemp

[31] rope, how does he get the remaining slack off the side of the tug?

A. Once you have a hold of the hemp rope, you can more or less just hold it and back up like you would a tug-of-war pull. You pull that rope back to where you've got enough slack, that's where the Captain's also watching if you need more slack, he'll feed you slack out of the winch, which will slide.

So you have that rope with a clevis on it, that will slide on that cable. So you're always at the center point of that hoop. So if he's letting out more cable, that clevis will slide on the cable to keep you still on the center of that hoop as he's feeding more out to you. Then you can more or less just hook it right onto the bit, right on the barge.

Q. Okay. And do you recall on August 20th, '97, seeing the six-foot hemp rope attached to that cable on the tug?

A. Any time we used that steel cable there that we were using that hemp rope.

Q. Okay. On August 20th you were working with Mr. Rutherford, correct, just before he was injured?

A. Correct.

Clapsadle - Shornack-Smith - 07/08/99

[32] Q. And who was the man on the tug, who was the man on the barge?

A. At that time, I believe we had just changed from Gene being a flopper. I went to the flopper at that time. Gene and I—Gene was on duty and I was his backup, so—Steve was in bed at the time.

When we unhooked off the empty and re-hooked up to the full, I believe I was the one that was on the barge and Gene was on the bow of the tug.

Q. Okay. Do you recall him—he was responsible, then, for taking the loop off of the front bit, or hoop as you described it, and handing it to you so you could face the tug to the barge.

A. Correct.

Q. Did you actually see him do that procedure?

A. Yes, I did. You really can't miss it. You got to be watching while he's handing it to you.

Q. Okay. And what—do you recall there being the six-foot hemp rope attached to the hoop?

A. Say for positive that it was there. Once we had put them on a steel cable, they were there, I believe, the rest of the time that I was on the tug when we had the steel cable on there.

Clapsadle - Shornack-Smith - 07/08/99

[33] Q. You said once you put them on there. Once you put what on? The hemp rope?

A. The hemp rope.

Q. Do you recall when that was done that season? When the hemp rope—

A. When I had first gone on the tug—I don't believe we had them on. On the steel cable. We had swapped out that steel cable to a lightweight, almost like a nylon, known as Kevlar.

We had problems with the Kevlar snapping from when you winch it up tight on the bit of the barge, so we removed that after we had broke it, and put the steel on. That was when we went to the hemp line hooked onto the steel cable for assisting you in lifting it up and lowering it down.

Q. So when you—now, are you saying when you joined the ship initially they were using the Kevlar line?

A. When I had joined the ship they were using a steel cable.

Q. Okay.

A. Now I understand they did have some Kevlar lines on there before I got there, had wore the out, and

* * * * * *

Clapsadle - Shornack-Smith - 07/08/99

[38] A. Once he hands the line to me, it is my job to hook them up to the corner bits on the barge. Once I'm hooked up on the barge, then the captain runs electric winches and tightens up the lines, pulls the tug and barge right together tight.

Q. How many lines are we talking about?

A. You're running two lines, one line off of its own winch. So you have two separate winches running two separate cable.

Q. And where was the second cable?

A. Well, with your cables for mating to the barge, you would run one cable off the port and one off the starboard.

Being the tug was so much wider—or, the barge was wider than the tug, you would be going off of your right side, as you port, out to the corner of the barge, then your other loop would come off of the winch, out to the left side of the tug.

So you more or less were making a V right back to the bow of the tug with your two hoops and the cable out to the barge.

Q. The idea is the tug is going to push the barge?

A. Correct.

* * * * * *

Clapsadle - Shornack-Smith - 07/08/99

[55] A. I don't recall if I had to sign anything there on that, but he did have me read it, and then I'm not sure if that was just something, an accident report or exactly what it was. I don't remember that.

Q. Okay. Do you know whether Lake Michigan had a safety program?

A. I'm really not sure on that.

Q. Did you ever—were you required to attend safety meetings?

A. Not to—not to my knowledge, no.

Q. Were you provided any safety booklets?

A. I'm—nothing that we were each issued. Thinking back, like I say, it's been a couple years, whether there was one there on the tug—like I say, I can't say for positive.

Q. How about safety equipment such as black belts?

A. Nobody, while I was on the rig, was issued anything there.

Now from what I understood, I think there was a—there was a back support or a—some kind of a lifting belt or something, I was told there was on there somewhere. But myself, I never used one, you know?

* * * * * *

Clapsadle - Cullinan - 07/08/99

[60] where there was maneuvering of the boat, or of the tug, that led to that breaking, is that correct?

A. That—that was the—that was what had happened there with the steel lines when we were maneuvering. We had just come off of the Rouge River onto the Detroit River there.

Q. Okay. Those steel lines didn't chafe the same way that Kevlar lines do, did they?

A. Not at all. No.

Q. Now, based on your experience, were the steel lines more durable than the Kevlar lines?

A. Yes. Yes.

Q. And the entire time you were on the Shirley Joy, you didn't have the problems that you had with the Kevlar lines when you were using the steel cables, did you?

A. No. No.

Q. In other words, none of the steel cables ever chafed and broke?

A. No.

Q. And if I had it correct, it was more than once that the Kevlar lines broke when they were used on the Shirley Joy?

[61] A. Correct.

Q. At one point while you were out there, brand new ones were brought on, and within a short period of time, those broke?

A. Yes. Broke a couple times.

Q. Okay. These lines that run from the dredge to the barge, those are permanently attached to the dredge, right?

A. That's correct. They are wired right into the winches right on the dredge.

Q. And the dredge doesn't go back and forth anywhere, does it? It basically stays in place in the river, or whatever's being dredged?

A. At the time that they're dredging when we're hooking to them and unhooking from the, they have spots that are steel eye beams that are dropped, and they're right down into the bottom, to where it's locked in place by steel poles.

Q. Okay. So they're not going in to resupply the dredge or anything like that, are they?

A. Pardon me?

Q. The dredge isn't going anywhere to be resupplied while it's out there doing the dredging, is it?

[62] A. No, it isn't. Any—anything they need, if they need fuel, we transfer them fuel or anything onto it off of the Shirley Joy.

Q. Would it be more difficult to change the lines on the dredge than it is on the tug? In other words, if the line snapped?

A. Yes. You have a lot more line there.

Q. So it's important to them that they use those steel cables off the dredge?

A. That's correct.

Q. When facing up the full barge to the tug, you mentioned one deck hand will be on the tug and one goes down onto the barge, correct?

A. That's correct.

Q. And the deck hand on the barge lifts the cable off the bit, lifts the eye of the cable off the bit; is that right?

A. When you're unhooking.

Q. Okay. Where is the bit—how high off the ground is that?

A. Now you're saying the bit on the barge?

Q. No, on the tug.

A. On the tug, when you're—

Clapsadle - Cullinan - 07/08/99

[63] Q. When you're connecting to the tug—as I understood it, when you first got to the full barge, you got down on the barge and Mr. Rutherford stayed on the bow?

A. That's correct.

Q. Okay. And he at that point is lifting the eye—I'm sorry, go ahead and describe what he was doing.

A. He lifts the hoop of the cable off of the bit on the top up on the tug.

Q. Okay. Where is the bit on the tug?

A. It's right in the bow. Right at the further point forward on the—on the tug.

Q. Okay. Is it on the side of the tug?

A. No, it sticks straight up in the front.

Q. Okay. How high up off the ground is it?

A. From a loaded barge to that bit, I would say you're looking at least probably eight to ten feet.

Q. Okay. Is the hoop being lifted all the way from the ground of the tug up over the bit, or is the bit, the bottom of the bit, off of the ground?

A. The bottom of the bit is up, I would say probably knee high to where you have your sides of the tug that come around, and it's welded right in with the sides

[64] of the tug.

Q. Okay. So the deck hand who's up on the tug isn't lifting the eye off of the ground, is he?

A. No, where you grab that would be grabbing right about your knees or your thighs.

Q. And of the two deck hands, the one on the tug and the one on the barge, is it correct that the one on the barge has the more difficult job of the two?

A. Well, I would say, because once—once the guy on the tug hands you that cable down, you have to get hold of that cable and then back yourself up on to the barge farther because you're right where the tug and the barge are meeting.

Then you have to back up onto the barge and then swing yourself out to where you're swinging an angle from the side of the tug out to the corner of the barge.

Q. Okay. Does he hand you the hoop directly?

A. He hands the hoop of that down by lowering it down to me with the rope.

Q. Okay. So he's just holding the hoop of the cable for just a second or two, correct?

A. Well, he picks it up, then the weight of that

[65] cable he lowers down with the hemp rope.

Q. Okay. By way of lowering the rope. So he's got leverage up there?

A. Yeah. Yeah. So you don't have to lean over trying to lean over the tug so far.

Q. And is he using the same sort of stance that you mentioned before, sort of a tug-of-war stance when he's lowering it?

A. That, you're—you're not really leaned back as far, like you would be on the barge.

Q. Okay. Is there not as much weight you're dealing with up there as you are on the barge?

A. Well, you're—you're dealing with more or less just lowering that cable down. Once you're on the barge, you got to pull on that cable and more or less get what you can, a slack, out of that cable to stretch it out enough to make the bit.

Q. Okay. So gravity's sort of doing some of the work for the guy on the tub?

A. Correct.

Q. How close are those two deck hands, when you're working together? When he's lowering that eye to you?

A. Oh, you're, like I say, six, eight feet below.

Clapsadle - Cullinan - 07/08/99

[66] Q. Okay. You're close enough to see the other deck hand?

A. Yes.

Q. And to hear him?

A. Yes.

Q. Okay. At any time on August 20th when you were on the barge and Gene Rutherford was on the tug lowering you the bit, you didn't notice anything—anything unusual about him, like he was in pain, did you?

A. Not right at that point, no.

Q. The first time was when he was on the barge later is when you noticed anything about him?

A. Yes. When I was coming back up the barge.

Q. Okay. And he didn't make any complaints, physical complaints, while he was still on the tug?

A. Not at that time.

Q. How did he—or how does one get, as he did, from the tug to the barge?

A. More or less on the tires on the front of the barge, they're put on, or on the front of the tug, they have a rubber—rubber push—push guard on there that's more or less built like a ladder.

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Clapsadle - Cullinan - 07/08/99

[70] Q. What would happen if the line between a tug and a full barge were to snap? What happens?

A. Well, if you lose just one, you more or less have to—you can try to stop. If you try to stop, it will make the barge

swing in the direction opposite with the one that snapped, because you only have that one line.

But if you wanted—you try to keep the push, you would have to be cutting, you know, opposite of where your snapped line was, because you don't have nothing there holding that. That barge will just, more or less hinge. The barge will hinge right on the bow of the tug.

Q. It loses control of the barge?

A. Yeah. Yeah.

Q. And certainly, if both lines snap, then the tug doesn't have any control of it at all?

A. Then it's more or less up to the deck hand to get them cables out of the water, get 'em back onto the tug and then put a man on the barge while the tug swings around and comes in for a hookup to go to tow.

Q. And when the barge is floating unhooked from the tugs, is that in any way dangerous?

[71] A. Yeah. I would say it's pretty much dangerous to everybody.

Q. To your knowledge, no deck hands with Lake Michigan Contractors were ever denied the use of any safety belts or safety equipment, were they?

A. No.

MR. CULLINAN: That's all I have.

RE-EXAMINATION BY MS. SHORNACK-SMITH.

Q. Just a couple more. Mr. Clapsadle?

A. Yes.

Q. Was the dredge—were the dredge and barge the same length?

A. Pardon me?

Q. Were the dredge and the barge the same length?

A. I would say the dredge may have been a little bit longer than the barge.

Q. Okay. So when we referenced the bow and the stern lines between the dredge and the barge, are we talking about the lines being connected to the very front on the bow of the barge?

A. Well, that's your difference, where—where they

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

GENE A. RUTHERFORD, JR.,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 98CV769
	)	Judge Miles
LAKE MICHIGAN CONTRACTORS, INC.,	)	
	)	
Defendant.	)	

Transcript of deposition of WAYNE MOON, Agent of Defendant herein, called by the Plaintiff as upon cross-examination, pursuant to Notice and Court Order, pursuant to the Federal Rules of Civil Procedure, before Denise C. Winter, a Registered Merit Reporter and Notary Public within and for the State of Ohio on Thursday, September 2, 1999, at the offices of Merit Reporting Services, 2000 East Ninth Street, Suite 310, Cleveland, Ohio, commencing at 10:00 a.m. and concluding at 11:15 a.m.

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MERIT REPORTING SERVICES

2000 East Ninth Street, Suite 310

Cleveland Ohio 44115

216-781-7120

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[22] using the plasma line as opposed to the steel cable?

A. No.

Q. So it was primarily strength?

A. I believe so.

Q. Because it was more expensive; is that correct?

A. Significantly.

Q. You had to add stuff to it for abrasion purposes; is that correct?

A. Uh-huh. The cables chew up those bollards pretty good.

Q. Was the chafing material expensive, also?

A. The partek cost more than scrap fire hose, I'll say that, but no—

Q. When you say "fire hose"—

A. Canvass. Rubber hose with canvass covering.

Q. And you would buy scrap fire hose for that purpose?

A. No. We would have it on the boat. Stuff that had leaks in it, we would cut it up and use that.

Q. So the—let me ask you this: How many times do you recall ordering the plasma line for the Shirley Joy?

A. One time.

Q. Do you know what was used as chafing material for that?

A. The partek.

Q. For the plasma line that was used on the Shirley Joy?

[23] A. Uh-huh.

Q. What was it?

A. Partek, and in addition to fire or mill hose.

Q. When you say, "mill hose," what do you mean by that?

A. Mill hose is made of a very similar—it's a very similar composition, but it doesn't have the resistance to bursting that fire hose has.

Q. Was the plasma line ever put into actual use on the Shirley Joy?

A. Yes.

Q. Do you know when that began?

A. I don't have any specific date.

Q. Prior to August 20, 1997?

A. Yes. Sometime between May and August.

Q. Wear can lessen the strength of steel cable?

A. I would presume that it can.

Q. I'm just asking you that because you said all lines at some point wear down.

A. Yeah. A steel cable is typically a 6 by 19, what's called a 6 by 19 meaning there's 6 independent strands and each one of those independent strands has 19 wired twisted and when those things start to deteriorate, we don't usually wait for them to get to that point. We replace them.

What happens is that we have some misuse occasionally by personnel who don't set them over the cleats properly.

[24] Here's an illustration: It comes off of the boat and comes around and goes back to the boat. Sometimes it twists and they set it on there and they don't know it's twisted until the captain takes up the slack out of it. He says, it's twisted, you have to take the slack off of it. He'll back the boat up to take the slack off and take it off and twist it over. In the meanwhile, there's a little kink and at that point they get replaced.

Q. Do you know Gene Rutherford?

A. Yes; I do.

Q. You are aware that he had an accident on August 20, 1997?

A. That's correct.

Q. Do you know if the plasma cable was in use at that time?

A. I don't know. I don't think that is was, but I really don't know. I really don't know.

Q. It is not in use at this time—

A. No.

Q. —for the Lake Michigan Contractors; is that correct?

A. That's correct.

Q. And it appears, from what you have supplied to me today—we'll mark this, but you supplied to me today regarding the Notice Duces Tecum that you only ordered it one time?

[25] A. For the Shirley Joy; yes.

Q. Why is it no longer in use by Lake Michigan Contractors?

A. Several reasons.

Q. Okay.

A. Unsatisfactory performance is one of them, but the primary reason is the safety factor. I should say that. Unsatisfactory performance leading to an unsafe condition.

Q. We'll get back to that. Do you have a standard maintenance rotation for the steel cable?

A. Only a visual inspection. They all wear at different times. Only a visual inspection that when a cable develops what we call burrs, kinking or parting of strands. Cable will last indefinitely, but it depends on so many factors.

Q. Eventually it will wear down?

A. Absolutely.

Q. What was the unsatisfactory performance of the plasma line?

A. The unsatisfactory performance was that while the manufacturer's specifications stated that it had a higher resistance to breakage than a one-inch cable, we actually went to a larger diameter than one inch. We went to inch and a quarter.

Q. For?

A. Of the plasma to increase, to really go above and

[26] beyond what we felt was going to be the required breaking strength needed to operate the boat or to operate it safely.

Q. What's the smallest you can buy; do you know?

A. The smallest of?

Q. The plasma line.

A. To tell you the truth, I really don't know. I don't know how small it comes, but I know it can go quite large, as well. When we purchased that line, I talked to the owner about it and we were first looking at one inch versus one inch.

Q. One inch versus?

A. One-inch plasma versus one-inch cable and I told him how much higher the breaking strength was. It was several years ago, so I don't remember the exact number of pounds or whatever it's rated at, but his answer was go to inch and a quarter, it will be safer.

Q. Do you remember who you talked to?

A. Kathy Samsel. Are you talking about the application?

Q. What owner you talked to.

A. Of?

Q. The plasma. Who told you to go to an inch and a quarter?

A. Joe Walsh.

Q. Joe Walsh, the owner of the company?

A. Yes. Co-owner of Lake Michigan.

[27] Q. Who did he talk to?

A. About?

Q. I misunderstood. I thought you were talking to someone who you were buying the plasma line from. You told him the application it was used for and they told you to be safe, go to one and a quarter inch.

A. Not to be safe but to increase the safety factor; yeah. That would be Joe Walsh.

My discussions initially were with Kathy Samsel about different types of material, Kevlar, Spectra or plasma, and I reported back to the owner of Lake Michigan and said, here's what we got. Kevlar and Spectra do not have as high a breaking strength as plasma. They do not have the resistances to abrasion that plasma has and they do not have the resistances to heat fatigue that plasma has, and I says, that's what I think we should go with. And I said, it's a higher breaking strength with one-inch plasma as opposed to one-inch steel cable and I think we should go with that product. He says, that's fine, but go to an inch and a quarter.

Q. Okay. Do you know at the time that you were ordering—well, first let me ask you this—

MR. CARLEY: Can we mark those as 1 and 2?

(Documents marked for identification as

[28] Moon Deposition Exhibits 1 and 2) BY MR. CARLEY;

Q. Let me show you what's been marked as Moon Exhibit Number 1, and this looks like an invoice from the Samsel Supply Company; is that correct?

A. It's a photocopy of an invoice from the Samsel Supply Company; yes.

Q. I see there's some handwriting on it. It looks like Lorain and it says, Curly B. Is that your handwriting?

A. No.

Q. Do you know whose that is?

A. No; I don't. But I can safely say it's a member of our staff in Holland, Michigan.

Q. What has been marked as Moon Exhibit 2 looks like an invoice also from the Samsel Supply Company. The Exhibit 1 was dated 10/17/96. Exhibit 2 is dated 12/10/96. This has some handwriting on that. Is that your handwriting?

A. No.

Q. Do you know whose that might be?

A. I can only speculate it's a member of Lake Michigan staff somewhere.

Q. And that says?

A. Fairport, Shirley Joy.

Q. Also, it has something below it with a question mark. Do you know what that says?

[29] A. "Equipment," question mark.

Q. Do you know why that would be there?

A. I can tell you anything you want to know about any of this stuff. Someone wrote "equipment," on there prior to

wanting to—when they wrote "equipment," question mark, apparently they got it in their possession and said who do we charge this to? There's no mention up here as to what vessel there may be on this one; no. There's no mention of a vessel.

Typically when we use a PO, we don't use a number. We use the name of the vessel, but in this case, someone got this invoice and they said, "equipment," question mark. In other words, they're inquiring what does it go to, and Shirley Joy being that's the equipment that it went to and Fairport was the project, that was where the expense for the material was charged to.

Q. Where is Fairport at?

A. It's in—it's just east of Cleveland by maybe 30 miles. It was probably purchased during that project. I would think that R and M stands for repair and maintenance. That's a typical coding.

Q. It was purchased during that project?

A. I don't know that. It was charged to that project.

Q. Your belief, though, is that—I believe you testified earlier it went into use, the plasma line went

[30] into use, on the Shirley Joy sometime between May and August of '97.

A. The boat captain would be better suited to answer that question, but I believe that's the case.

Q. Do you know if the plasma line that was ordered was at least as strong as the—let me strike that question.

You say the plasma line was taken out of use because of its resistance to breakage?

A. No. It wasn't taken out of use because of its resistance to breakage. It was taken out of use because of its lack of resistance to breakage.

Q. What do you mean by that?

A. The captain come to me and he said, Wayne, he says, when we're using our one-inch cable, the motors that power the deck wenches aren't strong enough to break the cable. He says, these cables break from the twisting of the barges when they're in rough weather moving around, and he says, we can walk through the synthetic stuff with the motors at any time. If I overtighten them, somebody is going to get their head ripped off because these things shoot back like whips.

Q. Do the steel cable—what happens with the steel cables if it breaks?

A. Generally speaking, it drops. It drops in place. I think there's—if I had to speculate, I think that there's less stored energy there than there is in a line because

[31] that's a deck hand's worst nightmare. When a line breaks, you can hear it popping and getting ready. You can hear the stress. Most people flee when they hear that.

Q. That's one of the reasons you use that nylon line, is that correct, at the end of the steel cable?

A. Yeah; I would say so. That takes a lot of resistance. I never seen a shock line break.

Q. That's one of the reasons you use a shock line made of nylon would be to take the tautness out of the steel cable?

A. I can't say to take the tautness out of the cable. I would say it's more of when the boat is twisting, you know, either going around a corner or if the barges are twisting in opposite directions in the rough lake, that instead of the cable stretching, there's some give on the shock line so some of the energy is transferred from the cable to the line.

Q. Did you use the nylon shock line with the plasma lines?

A. I believe they did.

Q. You don't know for sure?

A. No. I don't know for sure, but I believe they did. I believe that shock lines are always used.

Q. Do you know when this captain came to you and told you about this potential breaking problem with the plasma line?

A. Sometime during the project in Rochester. I would

[32] think it would have been sometime in July or August. He had told me that they had broken the line and had to tie a knot in it, in the synthetic line, and he came to me and said—I'm not sure. He came to me on several occasions. First time he said, we broke that line and I'm not real confident that this stuff is all it's cracked up to be, and I says, okay. I said, that's fine. It still seems to be in pretty good shape, but I'm not real happy with it.

Then the second time it broke, he came to me and said, hey—I think it was the second time—he came to me and said, hey, this stuff has got to go.

Q. After he came to you—well, let me ask you this: Do you know if it was before or after Gene Rutherford's accident on August 20th, 1997 that the captain came to you?

A. I generally don't remember clearly at this particular point, but I think it was before.

Q. After the captain came to you about these problems, did you ever entertain getting the plasma lines again for the Shirley Joy?

A. Nope.

Q. When they were—the plasma line was taken out of use on the Shirley Joy, was it also taken out of use on other Lake Michigan vessels?

A. To be honest with you, we had it on the Curly B, and I truly don't remember. I believe it was taken out of service

[33] after that because the vessel was at the dock and not being used and I think we discontinued its use all together after that.

Q. On all vessels?

A. Yes.

Q. Do you know if anyone else ever, for Lake Michigan at least, any employee or agent ever ordered plasma line other than yourself?

A. I can only speak for the Ohio division and no one within the Ohio division did. I don't know if they used it in our operation in Holland, Michigan or down in Florida or whatever. I couldn't answer that.

Q. And the weight of the line did not come into consideration when you decided to go to the plasma line or you decided to recommend the plasma line?

A. I would say that that was a minor consideration.

Q. Why was that a minor consideration?

A. My concern is for the safety of the personnel above and beyond everything else and if that has a higher resistance, supposedly a higher resistance, to breakage. I will also state that given the alternatives of other synthetic, between Kevlar and Spectra, we went with what we knew of to be the top of the line.

Q. Was there ever any problem with regard to the weight of the steel cable? Any complaints about its weight by the

[34] deck hands?

A. Not to my knowledge.

Q. Do you know if Lake Michigan Contractors supplies weight belts or anything like that for use by deck hands?

A. Yes.

MR. CULLINAN: I object to that and I'll let him answer that one question. We're not going very far with anything other than lines. Go ahead. You can answer that.

A. Yes.

Q. Why is that done? Why do they have a weight belt?

MR. CULLINAN: That's it.

BY MR. CARLEY:

Q. Is it because of the fact of the steel cables, lifting the steel cables?

A. Many factors.

Q. Is that one of them?

MR. CULLINAN: I'm going to object. Don't answer that question.

A. No—okay.

MR. CARLEY: Why don't we give him a call because I want to get this answered?

MR. CULLINAN: Go ahead.

MR. CARLEY: Would you read the last two questions back, please?

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